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The University of Mississippi School of Law was saddened by the recent death of Benjamin Sanders, Adjunct Professor of Law and member of the Oxford, Mississippi and Tupelo, Mississippi law firm of Webb, Sanders, Balducci & Smith, PLLC. Mr. Sanders was a former member and Associate Editor of Articles of the *Mississippi Law Journal*.

The Editorial Board and staff of the *Mississippi Law Journal* will sorely miss Mr. Sanders and the support he provided for our endeavors. In recognition of Mr. Sanders, we would like to dedicate Volume 68:3 in his memory.

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A MEMORIAL

LUCY SOMERVILLE HOWORTH
1895-1997

Samuel M. Davis[*]

On August 18, 1920, Lucy Somerville watched from the gallery of the Tennessee statehouse in Nashville as Tennessee became the thirty-sixth state to approve the Nineteenth Amendment to the United States Constitution, thus assuring ratification of the amendment securing forever women's right to vote. She was twenty-five years old. She would later spend her career in public and private life championing the cause of women's rights.

Lucy Somerville was born in Greenville, Mississippi, on July 1, 1895, the daughter of Robert and Nellie Nugent Somerville. She came from a long line of lawyers dating back to colonial America and from an early age aspired to be a lawyer, even though that was not the polite thing for young ladies to do. Her mother was a women's rights activist herself and took young Lucy to suffragist meetings and inspired in her daughter an independent spirit. Lucy's mother was the first woman to be elected to the Mississippi Legislature, where Lucy also served in the 1930s.

Lucy Somerville graduated from Randolph-Macon Woman's College in 1916 with a major in political science. Having earned Phi Beta Kappa honors, she spent the next year as a teaching assistant at Randolph-Macon and then studied international law at Columbia University the following year.

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[*] Dean and Jamie L. Whitten Chair of Law and Government, University of Mississippi School of Law. This memorial was only partially published at 67 MISS. L.J. 373 (1997) due to the editors' error.

She then returned to her native state to study law at the University of Mississippi School of Law, where she graduated at the top of her class in 1922. Graduating first in her class entitled her to give the commencement address[1] which foreshadowed her lifetime of service in the public and private practice of law and her long service in pursuing equality under law for women. In her commencement address she chides then Chancellor Powers for urging students to go home and tell their parents that Darwinistic ideas of evolution were not being taught or discussed on the Ole Miss campus.

Following graduation from law school she entered into private law practice with her brother-in-law in Cleveland, Mississippi. In 1924, Governor Henry Whitfield appointed her to the Board of Law Examiners, the first woman to serve on the board. In 1927, she became chair of the board, another first.

In the meantime, when her father died in 1925 she returned to Greenville to practice in order to be near her mother. In 1927, she was named United States Commissioner for the Southern District of Mississippi—we know them as Magistrates today—an appointment that earned her the title "judge." She would be known as "Judge Lucy" for the rest of her life, and if a visitor were a little slow to recognize the title on meeting her, the omission soon would be pointed out.

Lucy married Joseph Marion Howorth in 1928, and they established a practice in Jackson. In 1931, she ran successfully for a seat in the state legislature. In 1932, she served as a delegate to the Democratic National Convention. While she was still in her first term in the legislature President Roosevelt appointed her to the Board of Appeals of the Veterans Administration. She later served as general counsel for the War Claims Commission. In 1957, she retired from government service, and her husband and she returned to their native Mississippi to resume their practice of law back in Cleveland. They maintained an active practice until about 1980. Mr. Howorth died in 1982 following fifty-four years of marriage.

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[1] Lucy R. Somerville, *Intellectual Integrity and College Education*, 67 MISS. L.J. 375 (1997).

Lucy Somerville Howorth—Judge Lucy—died on August 23, 1997, at her home in Cleveland. She was 102. Throughout her public and private life she went where few women had gone before. Whether in the private practice of law, in government service, or through active participation in organizations such as the American Association of University Women and the Business and Professional Women's Club, her career was marked by courage, outspokenness, and a vision of equality for women in American Society.

In her commencement address, delivered on May 29, 1922, she said:

> We have been told in throbbing, sobbing tones, that the need of America is for men, we were told, not so long ago, that greater production of economic goods would cure the festering sores of our social structure; now we are told that over-production is one of the causes of those sores. Such foolish twaddle will be served to us until the real need of America is met, that need is for intellectual integrity, and honesty of soul which will face the world as it is, frankly and unafraid, and which will not lie to itself.[2]

Lucy Somerville Howorth lived her life, until the end, with that intellectual integrity and honesty of soul of which she spoke in 1922. She was unafraid, and she was true to herself. She was a champion of the free expression of ideas and a champion of the university as a marketplace of ideas. She was a good friend of Ole Miss, and she will be missed. We honor her memory with this tribute to her life.

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[2] *Id.* at 375-76.

A REVIEW OF THE SUBSTANTIVE PROVISIONS OF THE MISSISSIPPI GOVERNMENTAL IMMUNITY ACT: EMPLOYEES' INDIVIDUAL LIABILITY, EXEMPTIONS TO WAIVER OF IMMUNITY, NON-JURY TRIAL, AND LIMITATION OF LIABILITY

Jim Fraiser[*]

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[*] B.A. 1976, J.D. 1979, University of Mississippi; Hinds County Assistant District Attorney, 1980-1982; Private practice, 1983-1995, with emphasis on tort and contract litigation and criminal defense; Mississippi Special Assistant Attorney General, Civil Litigation Divisions, 1995-present, responsible for all Tort Claims Act and related § 1983 litigation in state and federal courts, and hearing officer for the Department of Environmental Quality. The opinions expressed in this article are those of the author only and not necessarily those of his employer.

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I. INTRODUCTION

This article examines the current status of Mississippi law concerning the substantive provisions of the Mississippi Governmental Immunity Act.[1] This review includes decisions by the Mississippi Supreme Court, the Mississippi Court of Appeals, and Mississippi's federal courts, as well as decisions published in other jurisdictions interpreting substantive issues pursuant to statutory tort claims act schemes similar to that of Mississippi's, which may be helpful in determining which interpretive direction our courts will take regarding substantive issues of the Act.[2]

II. JUDICIAL HISTORY CONCERNING PROCEDURAL ASPECTS

A. Inception of Immunity

Passed in April 1, 1993, the Mississippi Supreme Court began interpreting Mississippi's Governmental Immunity Act four years later.[3] Regarding the effective date of the Act, the court ruled that by its passage of the Act in 1993, the Legislature had revived immunity through April of that year, but had not waived immunity for the state and its agencies until July 1, 1993, and until October 1, 1993, for Mississippi's political subdivisions.[4] Consequently, the court declared that the State enjoyed absolute tort immunity from April 1 to July 1, 1993, and the political subdivisions from April 1 to October 1, 1993.[5] Such a state of affairs did not violate the state constitution, the court concluded, as placing rational limitations on recovery against governmental entities does not violate the "open courts" provisions of that document "since [the Act] has never been construed as guaranteeing limitless or absolute recovery for injury."[6]

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[1] MISS. CODE ANN. § 11-46-1 to -23 (Supp. 1998).

[2] The opposing viewpoints concerning the question of how strictly our courts should interpret the Legislature's Governmental Immunity Act were most eloquently expressed in another context, that of constitutional construction, by some of America's greatest legal minds. In *Bain Peanut Co. v. Pinson*, Justice Holmes stated that "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931). Contrast Justice Holmes' opinion with Thomas Jefferson's remarks in an 1803 letter that "[o]ur peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, at 419 (Andrew A. Lipscomb ed.) (1904). My own personal view of how strictly our courts should apply the Immunity Act's requirements was also ably voiced in the constitutional construction context by Finley Peter Dunne in *Mr. Dooley's Philosophy*, when he stated that, "th' constitootion iv th' United States is applicable on'y in such cases as it is applied to an account iv its applicability." Finley Peter Dunne, President's Message, *in* MR. DOOLEY'S PHILOSOPHY 103, 105 (1900).

[3] Sometimes referred to as the Mississippi Tort Claims Act, as in *Moore v. Carroll County*, 960 F. Supp. 1084, 1088 (N.D. Miss. 1997); the State Tort Claims Act, as in *Starnes v. City of Vardaman*, 580 So. 2d 733, 735 (Miss. 1991); the

B. Notice and Limitations Provisions

The Mississippi Supreme Court may have recently reversed itself regarding the longstanding issue of whether § 11-46-11 of the Mississippi Code mandates strict compliance with its claim notice and statute of limitations requirements. Following the lead of Mississippi's federal courts,[7] the Mississip-

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Immunity Act, as in *Richardson v. Rankin County School District*, 540 So. 2d 5, 7 (Miss. 1989); or the Sovereign Immunity Act, as in *Van Ovost v. City of Ackerman*, 147 F.R.D. 112, 117 (N.D. Miss. 1993); *McKay v. Boyd Construction Co.*, 571 So. 2d 916, 919 (Miss. 1990). The Legislature has not named the Act, but has designated Chapter 46 as "Immunity of State and Political Subdivisions from Liability and Suits for Torts and Torts of Employees," §§ 11-46-1 to -23; hence, my designation as the "Governmental Immunity Act".

[4] Gressett v. Newton Sch. Dist., 697 So. 2d 444, 445 (Miss. 1997). The court was referring to section 11-46-5. MISS. CODE ANN. § 11-46-5 (Supp. 1998). In *Chamberlin v. City of Hernando*, the Mississippi Supreme Court stated that the City of Hernando was protected by sovereign immunity for a cause of action that arose April 25, 1993. Chamberlin v. City of Hernando, 716 So. 2d 596, 600 (Miss. 1998). However, the opinion in *Chamberlin* is confusing in that it later states that the action is barred, not by this brief window of absolute immunity, but because the plaintiff did not follow the procedural limitations of the statute. *Chamberlin*, 716 So. 2d at 602.

[5] *Gressett*, 697 So. 2d at 445.

[6] *Chamberlin*, 716 So. 2d at 602.

[7] Moore v. Carroll County, 960 F. Supp. 1084, 1088 (N.D. Miss. 1997). The court stated that a plaintiff must file a valid notice of claim before filing a tort action against a government entity. *Moore*, 960 F. Supp. at 1088. *See also*

pi Supreme Court originally ruled that the service of proper claim notice, and the institution of suits against public entities within one year from the time of the injurious occurrence,[8] were mandatory jurisdictional requirements that must be strictly complied with.[9] Initially, the court held that although requiring strict compliance with the notice provisions concerning persons to be served, method of service, and claim information could sometimes lead to harsh results,[10] strict compliance with each element of the notice statute was consistent with legislative intent and must be enforced.[11] Remaining consistent with decisions by other courts in strict compliance jurisdictions, the court further ruled that strict compliance

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Simpson v. City of Pickens, 887 F. Supp. 126, 130 (S.D. Miss. 1995) (holding claim barred for failure to file claim with chief executive officer of entity before bringing action).

[8] Where plaintiff has provided proper notice of his claim within the one-year statute of limitations, he has a total of one year and ninety-five days to file his suit. MISS. CODE ANN. § 11-46-11(3) (Supp. 1998).

[9] City of Jackson v. Lumpkin, 697 So. 2d 1179, 1181 (Miss. 1997), *overruled in part by* Carr v. Town of Shubuta, No. 96-CT-01266-SCT, 1999 WL 62772 (Miss. Feb. 11, 1999). *See also* Carpenter v. Dawson, 701 So. 2d 806, 808 (Miss. 1997) (barring suit because attorney's two-sentence letter to city's liability carrier did not contain information required by section 11-46-11 of Mississippi Code), *overruled in part by* Carr v. Town of Shubuta, No. 96-CT-01266-SCT, 1999 WL 62772 (Miss. Feb. 11, 1999).

[10] *Carpenter*, 701 So. 2d at 808.

[11] *Lumpkin*, 697 So. 2d at 1182 n.1 (citing J. James Fraiser, III, *A Review of Issues Presented by § 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statute of Limitations*, 65 MISS. L.J. 643, 650 (1996) (stating "[t]he Mississippi Legislature's choice of mandatory, condition precedent language . . . suggests an intent to require strict compliance with the notice of claim provisions and a directive to the court to disallow mere substantial compliance")). *See Carpenter*, 701 So. 2d at 808 (noting requirement of strict compliance); *see also* Brown v. City of Greenwood, No. Civ. A. 4:97CV87-D-B, 1998 WL 433927, at *11 (N.D. Miss. June 29, 1998) (holding that service of notice in person or by registered or certified mail is "essential requirement" that must be strictly complied with and that notice by regular mail is insufficient); Owen v. Williamson, No. Civ. A. 1:96CV259, 1998 WL 378350, at *8 (N.D. Miss. May 4, 1998) (holding that service of notice upon highway patrol was insufficient where it was not served upon department's chief executive officer); Watts v. Lafayette County Sch. Dist., No. 97-CA-01089-COA, 1998 WL 850107, at *2 (Miss. Ct. App. Dec. 8, 1998) (holding notice to county's insurance administrator insufficient, even where administrator acknowledged receipt of notice).

could not be waived by the public entity's failure to advise a claimant's attorney that the notice as provided was defective.[12] In that same vein, the court ruled that § 11-46-11 was not unconstitutional as violative of equal protection[13] or due process guarantees because the state's interest in preserving state funds by instituting pre-suit investigations into tort claims against it bore a rational relation to its establishment of the notice requirement.[14]

But then, on the last day of 1998, the court reversed itself in the landmark 6-3 decision of *Reaves v. Randall*,[15] holding that (1) a chief executive officer for purposes of receiving notice may be any executive officer of a public entity who "can reasonably be expected to notify the governmental entity of its potential liability" after receiving otherwise proper notice of claim,[16] and (2) substantial compliance with the "simple requirements" of the notice statute will establish the court's jurisdiction over the case.[17] Although allowing substantial compliance to suffice vis-a-vis service of notice upon a chief executive officer, the court apparently re-affirmed that the information requirements must still be complied with to grant jurisdiction, and that the notice requirement is still a jurisdictional one.[18]

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[12] *Carpenter*, 701 So. 2d at 808.

[13] Vortice v. Fordice, 711 So. 2d 894, 896 (Miss. 1998). The Mississippi Supreme Court found that the Tort Claims Act did not violate the Equal Protection Clause. *Vortice*, 711 So. 2d at 896.

[14] Holmes v. Defer, 722 So. 2d 624, 628-29 (Miss. 1998), *overruled in part by* Carr v. Shubuta, No. 96-CT-01266-SCT, 1999 WL 62772 (Miss. Feb. 11, 1999). In *Holmes*, the court stated that it was unnecessary to discuss the constitutionality of section 11-46-11 of the Mississippi Code since the court had already affirmed the constitutionality of the statute in *Lumpkin*. *Holmes*, 722 So. 2d at 628-29. However, the court in *Lumpkin* did not address the constitutionality of section 11-46-11. Nor do the notice and limitations provisions violate the "open courts" provisions of the Mississippi Constitution, as stated by the court in *Chamberlin v. City of Hernando*, 716 So. 2d 596, 602 (Miss. 1998).

[15] No. 97-CA-00982-SCT, 1998 WL 909578 (Miss. Dec. 31, 1998).

[16] *Reaves*, 1998 WL 909578, at *4. The court apparently read a duty of delivery of notice into the statute that the Legislature may not have intended. *Id.* Section 11-46-11 mandates (using the word "shall") that *claimants* serve notice of claim upon the chief executive officer of the entity sued, but *Reaves* clearly transfers that burden in part to government officials. *Id.* By establishing a duty of government officials to deliver improperly served claim notice to their chief executive officer, the court has effectively shifted the burden of service of notice, at least in part, from the claimant to governmental defendants. This burden-shifting approach has been routinely criticized and disallowed by most courts in jurisdictions where notice is a jurisdictional or condition precedent requirement, regardless of whether strict or substantial compliance with the notice procedures is required. *See, e.g.,* Life v. County of Los Angeles, 278 Cal. Rptr. 196, 200-01 (Cal. Ct. App. 1991) (holding that in condition precedent, substantial compliance jurisdiction "focusing on the duty of a public employee in receipt of a claim to forward

The State of Mississippi filed for rehearing on the issue concerning substantial compliance, asserting the issue need not have been considered because the executive officer of the entity sued and the school superintendent was served with notice; thus, the requirement was literally complied with.[19] This was so, the State averred, because § 11-46-11(1) of the Mississippi Code makes a school district a "governmental entity" for purposes of the Immunity Act, so service of notice upon the Superintendent strictly complied with § 11-46-11.[20] The State also requested rehearing because the court ruled that Mississippi is a substantial compliance jurisdictional state without establishing any further guidelines regarding what constitutes proper notice, and these guidelines are essential to the bench and bar as they deal with claim notice issues.[21]

In the meantime, counsel would be well advised to brush up on the Tort Claims Act law of other similarly situated states such as Colorado, Utah, Arizona, Washington and others, where substantial compliance with each element of the

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the claim to the proper agency . . . inappropriately shifts responsibility for filing a claim with the proper official or body from the claimant to the public entity"); Kramer v. Central Highway Dist., 889 P.2d 1112, 1116 (Idaho 1995) (holding that in condition precedent, substantial compliance jurisdiction, executive officer's knowledge of claim because of service upon other official does not satisfy the statute's requirement).

[17] *Reaves*, 1998 WL 909578, at *4. The court also ruled that a public entity's purchase of insurance does not waive the jurisdictional requirement of serving proper claim notice. *Id.* at *5.

[18] *Id.* at *4. The court noted that the notice letter did contain all the necessary elements required by the statute. *Id.*

[19] *Id.*

[20] *Id.* at *6.

[21] *Id.* at *4.

notice statute is required and notice is a jurisdictional requirement.[22]

However, if the court created a ball of confusion by citing no tort claims act precedent for its *Reaves* decision, it sent that ball spinning out of control with its follow-up decision of *Carr v. Town of Shubuta*.[23] Affirming that *Reaves* had indeed established a substantial compliance claim notice standard,[24] the *Carr* court held that (1) substantial compliance with the *condition precedent* information requirement was all that was required; (2) substantial information compliance was that which "informs the [entity] of the claimant's intent to make a claim and contains sufficient information" to satisfy the investigatory purpose of the statute;[25] (3) the city's investigation of the claim, settlement discussions with the plaintiff, and the mayor's knowledge that the plaintiff had filed a municipal claim form combined to estop the city from raising the defective notice defense;[26] and (4) that substantial compliance "is not the same as, nor a substitute for, non-compliance."[27]

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[22] Courts in jurisdictional/substantial compliance states have dealt with a variety of issues concerning the notice requirement. *See* Johnson v. City of Bountiful, 996 F. Supp. 1100, 1103-04 (D. Utah 1998) (holding city estopped from arguing plaintiff failed to comply with notice requirement when city attorney told plaintiff his medical bills would be paid and city had already paid some of his bills); Gardner v. City and County of Denver, 671 F. Supp. 713, 714 (D. Colo. 1987) (upholding award of attorneys' fees to defendant when plaintiff failed to strictly comply with notice provision); Hollingsworth v. City of Phoenix, 793 P.2d 1129, 1132-33 (Ariz. Ct. App. 1990) (holding notice that included estimate of total claim met requirement that notice contain "sum certain"); Brock v. Nyland, 955 P.2d 1037, 1040 (Colo. 1998) (holding notice sent to claims adjuster for regional transportation district did not meet statutory requirement that notice be filed with "governing body" or "attorney" of public entity); Regional Transp. Dist. v. Lopez, 916 P.2d 1187, 1190 (Colo. 1996) (stating notice by regular mail is not sufficient when statute requires "registered mail"); Woodsmall v. Regional Transp. Dist., 800 P.2d 63, 69 (Colo. 1990) (stating notice must be made by statutorily mandated methods unless proof can be made that another method resulted in timely service upon correct official); Feltes v. State, 385 N.W.2d 544, 548 (Iowa 1986) (barring plaintiff's suit for failure to exhaust administrative remedies); Farnum v. G.D. Searle & Co., 339 N.W.2d 392, 395 (Iowa 1983) (holding there is no discovery rule in general tort claims act cases). *See also* Brown v. New York City Transit Auth., 568 N.Y.S.2d 54, 55-56 (N.Y. App. Div. 1991) (refusing to allow theory of recovery not included in notice); McMillan v. Morin, 461 S.E.2d 43, 44-46 (S.C. 1995) (upholding award of sanctions for claim filed under Tort Claims Act after statute of limitations had run); Bischel v. Merritt, 907 P.2d 275, 278 (Utah Ct. App. 1995) (holding public entity could not argue plaintiff's notice was insufficient because it was sent to county attorney instead of the county commission as required, when county attorney had instructed plaintiff how to address letter of notice); Stikes Woods Neighborhood Ass'n v. City of Lacey, 880 P.2d 25, 28 (Wash. 1994) (holding that when computing limitation periods, final Saturdays, Sundays, and holidays are excluded); Andrews v. State, 829 P.2d 250, 252 (Wash. Ct. App. 1992) (holding requirement of filing claim with risk management office is mandatory before commencing suit); Oney v. Schrauth, 541 N.W.2d 229, 232-33 (Wis. Ct. App. 1995) (holding plaintiff's claim barred because of failure to serve written notice upon attorney general within statutory period even though plaintiff did not discover defendant was state employee until after time had expired); Modica v. Verhulst, 536 N.W.2d 466, 469 (Wis. Ct. App. 1995) (holding notice insufficient when it failed to name defendant).

[23] No. 96-CT-01266-SCT (Miss. 1999), 1999 WL 62772 (Miss. Feb. 11, 1999).

The problematic aspect of the *Carr* decision was the court's utilization of precedent from a jurisdiction with an entirely different tort claims act notice scheme[28] than Mississippi's, which further muddied the water as to what constitutes substantial compliance. Does the Mississippi Supreme Court require the level of compliance found in jurisdictional notice scheme states, condition precedent scheme states, or procedural precedent states? In light of this quandary, it may also be advisable for counsel to examine condition precedent/substantial compliance state court decisions, which may now be relevant to Mississippi notice of claim issues,[29] al-

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[24] *Carr*, 1999 WL 62772, at *2.

[25] *Id.* at *3.

[26] *Id.* With regard to estoppel, the court declared that, although the doctrine was not applied as freely to governmental entities as it was to private persons, proof of inequitable or fraudulent intent was not required to establish governmental estoppel. *Id.* at *4-5. The requisite proof, the court ruled, constituted a showing of a representation by the government, reliance by the plaintiff, and a change in position by the relying party. *Id.* at *5 (citing Izard v. Mikell, 163 So. 498, 499 (Miss. 1935)).

[27] *Id.* at *5. The court added that the attempts at compliance in *City of Jackson v. Lumpkin*, 697 So. 2d 1179 (Miss. 1997), i.e., sending copies of bills to a city employee, or *Holmes v. Defer*, 722 So. 2d 624 (Miss. 1998), i.e., no notice at all, or *Carpenter v. Dawson*, 701 So. 2d 806 (Miss. 1997), i.e., a two-sentence letter to a city adjuster, did not amount to substantial compliance. *Carr*, 1999 WL 62772, at *6.

[28] *Id.* at *2-3. The court cited several Indiana claim notice cases. *Id.* In Indiana, the notice requirement is neither jurisdictional nor a condition precedent; it is a procedural precedent, which is a more liberal standard. Most state supreme courts consider only the precedent from other states where a similar kind of statutory scheme exists. For example, a state with a jurisdictional notice scheme would look for precedent to decisions from states where the notice required was jurisdictional, and not to states where the notice scheme was a mere procedural precedent. While our court's efforts to establish a more equitable compliance standard is commendable, its mixing and patching of case law from states with different claim notice schemes has only served to confuse Mississippi's bench and bar, leaving them without any recognizable standard to follow in future claim notice cases.

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[29] The jurisdictional/substantial compliance decisions cited above are similar to those of other condition precedent/substantial compliance jurisdictions such as Massachusetts, Alabama, Oklahoma, Kansas, Georgia, Idaho, California, and others. For example, in those states, the courts have ruled that requesting information from and maintaining contact with the injured party does not estop the government from raising the defective notice defense. Large v. City of Birmingham, 547 So. 2d 457, 459 (Ala. 1989). *See also* Hill v. Newkirk, 31 Cal. Rptr. 2d 859, 866-67 (Cal. Ct. App. 1994) (rejecting plaintiff's argument that defendant is estopped from asserting plaintiff's failure to file claim as defense because defendant did not inform plaintiff of claims filing requirement); Schaefer v. Mayor of Athens, 170 S.E.2d 339, 342 (Ga. Ct. App. 1969) (holding that city's actual knowledge of plaintiff's claim from various communications is not waiver of notice requirement). However, when an authorized official makes a misleading statement as to the applicable notice requirements, estoppel may result if all elements of estoppel are pleaded and proved. *See, e.g.*, Zotta v. Burns, 511 A.2d 373, 377 (Conn. App. Ct. 1986) (holding evidence insufficient to apply estoppel doctrine when plaintiff could have "exercised due diligence" and determined that notice should have been sent to defendant rather than to defendant's insurance carrier); Moran v. Town of Mashpee, 461 N.E.2d 1231, 1233 (Mass. App. Ct. 1984) (reversing grant of summary judgment for city because there was genuine issue of material fact as to whether elements of estoppel existed); Jarvis v. City of Stillwater, 732 P.2d 470, 473 (Okla. 1987) (holding that communication from city did not support finding of equitable estoppel).

Even when a court applies the substantial compliance doctrine to the notice requirement, omission of an essential element of information will result in failure to comply with the statute. Dilts v. Cantua Elementary Sch. Dist., 234 Cal. Rptr. 612, 618 (Cal. Ct. App. 1987). *See also* Wiggins v. Housing Auth., 873 P.2d 1377, 1380 (Kan. Ct. App. 1994) (stating there can only be substantial compliance if plaintiff attempts to state each required element).

When the statute requires notice to the highest officer of a government department, notice to another officer is insufficient. Weaver v. Commonwealth, 438 N.E.2d 831, 834-35 (Mass. 1982). If the notice is then sent to the highest official after the expiration of the time limit, the second notice will not be found to relate back to the date of the first. *Id.* at 835. A complaint may not suffice as notice of a claim. Matlock v. Town of Harrah, 719 F. Supp. 1523, 1531 (W.D. Okla. 1989), *rev'd in part*, 930 F.2d 34 (10th Cir. 1991). *See also* City of Birmingham v. Prickett, 92 So. 7, 9 (Ala. 1921) (holding failure to file sworn statement of personal injuries within ninety days of injury renders complaint demurrable);

though the *Reaves* decision appears to utilize solely a jurisdictional statutory scheme analysis.

However, in March 1999, the legislature, reacting to the *Reaves* and *Carr* decisions, passed House Bill 778, an amendment to § 11-46-11 of the Mississippi Code.[30] These amendments made the following changes or clarifications regarding proper notice procedure: (1) notice to a county may now be served upon either the president of the board of supervisors or the chancery court clerk of the county sued, while notice to a municipality may be served upon the mayor or the city clerk, and notice to a state entity shall be had "only upon" the chief executive officer of the entity sued; (2) "every" notice of claim "shall be" delivered in person or by registered or certi-

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Pearlstein v. Malunney, 500 So. 2d 585, 587 (Fla. Dist. Ct. App. 1986) (holding that service of malpractice complaint does not satisfy statutory notice requirement).

Condition precedent notice schemes differ from jurisdictional ones in that the former create only a procedural bar to the institution of an act, while the latter create a substantive bar to relief. Both place the burden of proof upon the plaintiff to show compliance with the notice requirement, but only the jurisdictional defense need not be raised at any stage of the trial or appeal. *See, e.g.*, Millman v. County of Butler, 458 N.W.2d 207, 212-13 (Neb. 1990) (stating that compliance with notice requirement is not jurisdictional prerequisite in Nebraska); Cody v. Leapley, 476 N.W.2d 257, 262 (S.D. 1991) (holding that commissioner's failure to claim notice was not received prevents public entity from arguing noncompliance with notice requirement); Jones v. University of Wash., 814 P.2d 1236, 1241 (Wash. Ct. App. 1991) (stating filing of claim is condition precedent in Washington).

For a complete discussion of the various state court interpretations of notice of claim requirements, see Jim Fraiser, Annotation, *Waiver of, or Estoppel to Assert, Failure to Give or Defects in Notice of Claim Against State or Local Political Subdivision—Modern Status*, 64 A.L.R. 5TH 519 (1998); Jim Fraiser, Annotation, *Sufficiency of Notice of Claim Against Local Political Entity as Regards Time When Accident Occurred*, 57 A.L.R. 5TH 689 (1998); J. James Fraiser, III, Annotation, *Persons or Entities Upon Whom Notice of Injury or Claim Against State or State Agencies May or Must Be Served*, 45 A.L.R. 5TH 173 (1997); J. James Fraiser, III, Annotation, *Sufficiency of Notice of Claim Against Local Governmental Unit as Regards Identity, Name, Address, and Residence of Claimant*, 53 A.L.R. 5TH 617 (1997); J. James Fraiser, III & Mike Moore, Annotation, *Complaint as Satisfying Requirement of Notice of Claim Upon States, Municipalities, and Other Political Subdivisions*, 45 A.L.R. 5TH 109 (1997); 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT (Jon L. Craig ed.) (1992).

[30] H.B. 778, 1999 Reg. Sess. (Miss. 1999).

fied mail; (3) receipt of proper notice tolls the one-year statute of limitations for ninety-five days in actions against the state and for 120 days for actions against all political subdivisions, and after the tolling period has expired, plaintiffs have an additional ninety days to file their actions.[31] This amendment should clarify which persons are appropriate to receive claim notices and should nullify the Mississippi Supreme Court's holding in *Reaves* to the extent *Reaves* allowed service of claim notice upon any executive officer of a public entity.

C. Venue

Regarding venue, the court strictly followed legislative intent and ruled that the Act's exclusive venue statute[32] requires that all tort actions against the state be filed in the county where the injurious incident occurred, while all such complaints against political subdivisions must be brought either in the county of occurrence or where the political subdivision was located.[33]

III. SUBSTANTIVE PROVISIONS

A. Governmental Employee's Individual Immunity

1. From Qualified to Absolute Individual Immunity

Prior to the April 1993 passage of §§ 11-46-1 through 11-46-23 of the Mississippi Code, the State and its agencies enjoyed total immunity from negligence actions,[34] while Mississippi's municipalities were cloaked with immunity to the extent that they were engaged in government functions,[35] as opposed to proprietary acts.[36] All state and local government officials and employees were clothed with qualified public official immunity, which insulated them against tort liability for all acts or omissions in the course and scope of governmental employment, except when they committed intentional torts, substantially exceeded their discretion and authority, or performed ministerial acts, where they were subject to personal liability for their actions.[37]

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[31] *Id.*

[32] MISS. CODE ANN. § 11-46-13(2) (Supp. 1998).

[33] Jones v. Quinn, 716 So. 2d 624, 628 (Miss. 1998). Justice Sullivan, writing for the court en banc, stated, "Section 11-46-11(2) specifically states that no other venue statutes that otherwise would apply will be controlling in a lawsuit against the state or its employees." *Jones*, 716 So. 2d at 628.

[34] Mississippi Transp. Comm'n v. Rector, 663 So. 2d 601, 602 (Miss. 1995). *See also* Beverly v. Powers, 666 So. 2d 806, 809 (Miss. 1995) (stating that prior to *Presley v. Mississippi State Highway Commission*, 608 So. 2d 1288 (Miss. 1992), "the doctrine of sovereign immunity applied in Mississippi and was an absolute bar to any suit, in the absence of statutory authority").

The status of individual liability of governmental employees was drastically altered by the passage of the Governmental Immunity Act in April 1993. Section 11-46-7(2) of the Mississippi Code provides that although a governmental employee may be joined in an action against a governmental entity in a representative capacity only, "no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties."[38] Subsection 7 established a rebuttable presumption that "any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment,"[39] and required governmental entities to defend all employees for their acts and omissions within the course and scope of their employment.[40] Furthermore, the government is not entitled to contribution or indemnification from the employee unless the act or omission was outside the course of his employment.[41]

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[35] Government function has been defined as "activities or services which a municipality is required by state law to engage in and to perform." Anderson v. Jackson Mun. Airport Auth., 419 So. 2d 1010, 1014 (Miss. 1982).

[36] *Rector,* 663 So. 2d at 602. *See also* King v. City of Jackson, 667 So. 2d 1315, 1316 (Miss. 1995) (holding decision by city as to where to place traffic sign is governmental function and therefore, protected by sovereign immunity); Nathaniel v. City of Moss Point, 385 So. 2d 599, 601-02 (Miss. 1980) (discussing maintenance of traffic signals and traffic signs as governmental or proprietary functions).

Proprietary function has been defined as "activities in which a municipal corporation engages, not required or imposed upon it by law, about which it is free to perform or not," *Anderson,* 419 So. 2d at 1014, and as activities that "while beneficial to the community and very important, are not vital to a City's functioning." Morgan v. City of Ruleville, 627 So. 2d 275, 279 (Miss. 1993).

[37] Mohundro v. Alcorn County, 675 So. 2d 848, 853 (Miss. 1996) (citing Grantham v. Mississippi Dep't of Corrections, 522 So. 2d 219, 225 (Miss. 1988)). *See also* Davis v. Little, 362 So. 2d 642, 644 (Miss. 1978) (stating there is immunity if action involves discretionary decision-making, but not if action is simply ministerial).

[38] MISS. CODE ANN. § 11-46-7(2) (Supp. 1998).

[39] MISS. CODE ANN. § 11-46-7(7) (Supp. 1998).

However, this section also declares that an employee is not acting within the course and scope of employment when engaged in any acts of fraud, malice, libel, slander, defamation, or any criminal offense.[42] Although § 11-46-7 of the Mississippi Code provides that the *governmental entity* shall not be liable for any such acts by employees, it may be inferred that the *employees* themselves may be held personally liable for any acts held to be outside the course and scope of their employment.

Consequently, although governmental employees now enjoy an absolute, rather than a qualified public official immunity, and their immunity is no longer subject to the discretionary/ministerial analysis, they may still be held personally liable when engaging in the tortious acts specified in §§ 11-46-5(2) and 11-46-7(2) of the Mississippi Code. As was expected, this superceding of former law has created some interesting questions which may be answered only by our highest court. For example, where an employee is sued in her individual capacity only, must pre-suit claim notice be served upon the agency employing her? Would the commission of an intentional tort, such as an assault which may be the basis for a criminal charge, open the door to personal liability? And what is the definition of "course and scope of employment" as contemplated by this statute?

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[40] MISS. CODE ANN. § 11-46-7(4) (Supp. 1998).

[41] MISS. CODE ANN. § 11-46-7(5) (Supp. 1998).

[42] MISS. CODE ANN. § 11-46-7(2) (Supp. 1998). Section 11-46-5(2) of the Mississippi Code waived immunity only for criminal acts "other than traffic violations," which suggests that traffic violations do not constitute the kind of criminal offense that would take employees outside the course and scope of employment and subject them to personal liability.

2. Requirement of Notice in Actions Against Individual Employees

In *McGehee v. Depoyster*,[43] our supreme court may have answered the first question in the negative. Where a plaintiff had alleged that the defendant, a state employee acting in his individual capacity, defamed her, the court ruled that pursuant to the provisions of § 11-46-7(2), the employee was not acting in his official capacity when defaming the plaintiff to the press and accordingly, the plaintiff need not send him presuit notice of claim when suing him only in his individual capacity.[44] Prior to making that ruling, however, the court noted that the attorney for the school district cited no authority for his proposition that notice should be required even when the employee was not acting in the scope of his employment.[45] Would the decision have been different had the defendant cited precedent requiring notice under the circumstances? Indeed, a different result has been obtained in other states with tort claims act schemes similar to Mississippi's.

In *Leding v. Pittsburg County District Court*,[46] an Oklahoma court decided that plaintiffs must comply with tort claims act notice of claim requirements[47] even when alleging that a governmental employee acted outside the scope of employment in a willful and wanton manner.[48] Expressing doubt that the legislature meant to "leave the Act's protection of governmental agencies and employees . . . to the pleading option of the plaintiff/claimant,"[49] the court declared that "[c]ompliance with the notice provision of the Act, even in cases where the plaintiff/claimant alleges willful and wanton conduct, preserves the protection of governmental employees until the governing authority can review, investigate, and pass on the claim."[50] Failure to provide pre-suit claim notice under any circumstance, the court concluded, extinguished the right to sue the government or its employee.[51] The court also reasoned that since the Tort Claims Act was intended by the legislature to be the "exclusive" remedy for all torts committed by governmental entities and their employees, then claim notices must be provided prior to instituting all such actions.[52]

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[43] 708 So. 2d 77 (Miss. 1998).

[44] *McGehee,* 708 So. 2d at 80-81.

[45] *McGehee,* 708 So. 2d at 79.

[46] 928 P.2d 957 (Okla. Ct. App. 1996).

[47] *See* OKLA. STAT. ANN. tit. 51 § 156 (1988).

[48] *Leding,* 928 P.2d at 958.

[49] *Id.*

In *Poole v. Clase*,[53] the court focused upon the defend and indemnification provisions of the Indiana Tort Claims Act[54] (similar to Mississippi's[55]) in requiring ante-litem claim notice in an action against an individual governmental employee. Noting that Indiana's Act required the governmental entity to provide a defense and indemnify any state employee sued,[56] the court held that even though the plaintiff sued the governmental employee in his individual capacity alleging that the employee acted outside the scope of his employment, the Act nevertheless required that pre-suit notice of claim be served upon the governmental entity employing the defendant.[57]

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[50] *Id.* at 958-59.

[51] *Id.*

[52] *Id.* Title 51, section 153(B) states that "[t]he liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision, or employee at common law or otherwise." However, where tort claims acts do not purport to provide an exclusive remedy for all actions against governmental employees, i.e., where actions against individual employees are not taken into consideration by those acts, notice of claim is not ordinarily required prior to filing suits against employees in their individual capacities. *See* Bradford v. Davis, 626 P.2d 1376, 1381 (Or. 1981).

[53] 476 N.E.2d 828 (Ind. 1985).

[54] Section 34-13-3-5(c) of the Indiana Code provides that, subject to the Tort Claims Act provisions, "the governmental entity shall pay any judgment . . . against an employee when the act . . . is within the scope of the employee's employment, regardless of whether the employee can or cannot be held personally liable. . . ." Section 11-46-7(4) of the Mississippi Code requires that governmental entities defend all employees sued, and subsection 5 states that the government cannot receive indemnification from said employees for attorneys' fees, expenses, or for judgments paid until the court rules that the employee's negligent act or omission did not come within the course and scope of his or her employment with the government.

[55] MISS. CODE ANN. § 11-46-7(4)-(5) (Supp. 1998).

[56] The *Poole* court implied that had the statute given the state discretion as to whether or not to provide a defense, then the plaintiff would not have needed to provide pre-suit notice of claim to a defendant sued in his individual capacity only. *Poole*, 476 N.E.2d at 831.

Mississippi's Governmental Immunity Act provides that all governmental entities must provide a defense to any employee sued[58] and that the entities are not entitled to indemnification or reimbursement for attorneys' fees, expenses or any judgment taken, unless the court finds that the employee sued acted outside the scope of employment.[59] The Act further provides that "the remedy provided . . . against a governmental entity or its employee is exclusive of any other civil action. . . ."[60] Consequently, there exists authority for the proposition that even where a plaintiff alleges that an employee acted with malice, libel, or otherwise outside the scope of his employment, pre-suit notice of claim should be sent to the governmental entity. Our statute's presumption of employment by virtue of acting within the time and place of employment[61] makes this argument all the more tenable, since the *McGehee* court, in a dicta departure, implied that notice may be required when an employee is sued in his or her individual capacity but was acting in the course and scope of employment.[62]

The problem from the government's viewpoint is that it must first investigate a case to determine whether the employee was actually acting in the scope of employment and that the opportunity for pre-suit investigation is lost where ante-litem notice is not required. On the other hand, when the defendant is not acting in the course of his employment, as was the case in *McGehee*, why should the claimant be burdened with the notice of claim requirement?[63] But until the supreme court revisits *McGehee* or hears a similarly situated case, pre-suit notice of claim is not required when suing a governmental employee in his individual capacity and pleading acts outside the course of employment. Even so, the best practice would be to provide pre-suit notice even when suing an employee in his or her individual capacity since it may later be proven that the employee was acting within the course and scope of his or her governmental employment, in which case the notice would be legislatively mandated and judicially required.

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[57] *Id.* at 830-31.

[58] MISS. CODE ANN. § 11-46-7(4) (Supp. 1998).

[59] MISS. CODE ANN. § 11-46-7(5) (Supp. 1998).

[60] MISS. CODE ANN. § 11-46-7(1) (Supp. 1998).

[61] MISS. CODE ANN. § 11-46-7(7) (Supp. 1998).

[62] McGehee v. Depoyster, 708 So. 2d 77, 79-80 (Miss. 1998).

[63] *See Roberts v. Timmins*, 281 N.W.2d 20, 24 (Iowa 1979) (stating that

3. The Statutory Exceptions to Employee Immunity

Sections 11-46-5(2) and 11-46-7(2) of the Mississippi Code provide that six acts, if performed by governmental employees, take such employees outside the course and scope of their employment.[64] This provision serves two purposes: to allow for individual liability for certain acts and omissions, and to immunize the governmental entity for those same acts and omissions. The question in both instances is whether an employee's act falls into any one of the specific exceptions set out in both statutes.[65] For example, may a police officer's driving be so malicious as to amount to a criminal act? Does an officer's baseless arrest also amount to slander *per se* for purposes of these statutes? Mississippi's courts have answered these and other questions, and a few decisions from other states may also be helpful in determining when a governmental employee is acting beyond the course and scope of his or

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"where the municipality is under no obligation to either defend or indemnify, however, the purpose [of giving notice] is not furthered and an unjustified hurdle is placed in plaintiffs' path to the courts").

[64] The acts that take the employee out of the course and scope of his employment are fraud, malice, libel, slander, defamation, or any criminal offense other than traffic violations. MISS. CODE ANN. § 11-46-5(2) (Supp. 1998).

[65] It has been held that an action cannot be maintained against a governmental employee in his individual capacity unless the complaint specifically alleges that the employee is sued in his "individual capacity" and that a plaintiff's allegations that the defendant-employee was at all times acting in his or her official capacity may defeat any other individual liability allegations. Dickens v. Thorne, 429 S.E.2d 176, 180 (N.C. Ct. App. 1993).

her employment by performing one or more of the acts enumerated in sections 11-46-5 and 11-46-7.

(a) Malice and Criminal Offenses

If a governmental employee commits a tort with malicious intent, or the tortious act constitutes a criminal offense other than a traffic violation, then that employee may be held personally liable for that act, and the governmental entity employing him may not be held liable for his malicious or criminal act.[66] The key question, however, is how the courts will define the terms "malice" and "crime" for purposes of the Act.

Considering the question of whether a police officer's reckless driving amounts to the commission of a crime, i.e., assault, thereby making him individually liable for his negligent driving, the Mississippi Supreme Court, in *City of Jackson v. Lumpkin*,[67] ruled that since the officer's act of driving his patrol vehicle into the plaintiff's car constituted negligence, but did not amount to the crime of assault, the provisions of section 11-46-7(2) did not defeat the officer's individual immunity.[68]

In *Moore v. Carroll County*,[69] Mississippi's northern district court considered a factual scenario where a deputy sheriff's gun accidentally discharged during a roadside arrest subsequent to a vehicular pursuit from Carroll to LeFlore County.[70] The plaintiff brought a civil action against the deputy, but the court, noting the rebuttable presumption that acts committed within the time and place of employment are within the course and scope of employment,[71] and acknowledging that the plaintiff offered insufficient proof that the deputy's act constituted "either malice or any criminal offense,"[72] granted a summary judgment on behalf of the deputy in his individual capacity.[73]

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[66] *See* MISS. CODE ANN. § 11-46-5(2) (Supp. 1998) (providing that government has not waived immunity for malicious or criminal acts of its employees).

[67] 697 So. 2d 1179 (Miss. 1997), *overruled in part by* Carr v. Town of Shubuta, No. 96-CT-01266-SCT, 1999 WL 62772 (Miss. Feb. 11, 1999). In *Carr*, the Mississippi Supreme Court adopted a substantial compliance standard. *Carr*, 1999 WL 62772, at *2.

[68] *Lumpkin*, 697 So. 2d at 1182.

[69] 960 F. Supp. 1084 (N.D. Miss. 1997).

[70] *Moore*, 960 F. Supp. at 1086.

[71] MISS. CODE ANN. § 11-46-5(3) (Supp. 1998).

In *Smith v. Thompson*,[74] a federal district court ruled that although several sheriff's deputies went to the wrong apartment and falsely detained the plaintiff at gunpoint, mistaking her for the person named in their arrest warrant, their actions did not amount to malice and the deputies were not liable in their individual capacities by virtue of the provisions of section 11-46-7(2) of the Mississippi Code.[75]

However, in *Moore*, the federal district court decided that although the plaintiff failed to allege in his negligent training count that the sheriff acted with fraud, malice, libel, slander, defamation or any criminal offense, his allegation that the sheriff hired and armed a deputy knowing the deputy had inadequate training with weapons, could conceivably be construed as an allegation of malice because malice is defined as "an objective state of mind which may be inferred if . . . the defendant acted with ruthless or reckless disregard for the plaintiff's rights."[76] Consequently, the court denied the sheriff's motion to dismiss the negligent training count on the ground of individual absolute immunity as provided by section 11-46-7(2), stating that the question of malice presented a viable jury question.[77]

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[72] *Moore*, 960 F. Supp. at 1089.

[73] *Id.*

[74] 2:96CV159-B-B, 1998 WL 97287, at *3 (N.D. Miss. Jan. 28, 1998).

[75] *Smith*, 1998 WL 97287, at *3. *But see* Freeman v. Jackson County Sheriff's Dep't, No. 97-CA-00119-COA (Miss. Ct. App. 1998) (ruling that plaintiff's allegations that several officers acted outside course and scope of their employment by placing him in choke hold and spraying him with pepper spray after placing him in custody were sufficient to defeat motion to dismiss, since such acts could possibly be found to be criminal or to be committed with malice, in which case rebuttable presumption of employment would be overcome by exceptions to employment contained in section 11-46-5(2)).

[76] *Moore*, 960 F. Supp. at 1091.

[77] *Id.* But see *Foster v. Noel*, 715 So. 2d 174, 180 (Miss. 1998), where the Mississippi Supreme Court held that the slander exception to the scope of employment would not be inferred from a count of false arrest, even though false

Other state courts have held state employees individually liable for actions found to be of the malicious or criminal variety. For example, in *Doe v. Durtschi*, when a teacher who was accused of the sexual molestation of his students brought a cross claim against the school district for indemnification, the Idaho Supreme Court affirmed summary judgment in favor of the school district.[78] Noting that the Idaho Tort Claims Act provided that a governmental entity need not defend or otherwise indemnify an employee acting outside the course and scope of his employment with "malice or criminal intent,"[79] the court declared that since the teacher had pled guilty to the criminal charges of lewd and lascivious behavior and since the evidence pointed to the teacher's knowing and conscious performance of criminal acts, summary judgment was warranted, holding the defendant individually liable and absolving the government of the responsibility of defending him.[80]

Reading the Idaho case in concert with the above Mississippi decisions, it appears that no amount of negligence, or even reckless disregard, will suffice to establish the malice or criminal intent necessary to hold a governmental employee liable in his individual capacity pursuant to the provisions of sections 11-46-5(2) and 11-46-7(2). On the other hand, where the employee has pled guilty to a crime, or where his or her actions clearly bespeak themselves of malice or a criminal offense, the individual employee may be held personally liable. However, in light of our courts' strict interpretations of the individual liability provisions of the Act, the proof of malice or criminal offense would likely have to be, in the common ver-

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arrest could constitute slander *per se*, and denied the city's motion to dismiss on grounds that the officer acted in his individual capacity and outside the course and scope of employment. *Foster*, 715 So. 2d at 180. Apparently, the Mississippi Supreme Court is less inclined to infer a cause of action left unpled than is the Northern District Court. As the former court's opinion is the more authoritative one, plaintiff's counsel would be wise to resort to comprehensive allegation, even in our notice pleading environment.

[78] 716 P.2d 1238, 1243 (Idaho 1986).

[79] *See* IDAHO CODE § 6-903(c) (1998).

[80] *Durtschi*, 716 P.2d at 1243. The court stated there was no genuine issue as to any material fact whether an employee acted with criminal intent. *Id.*

nacular, "as strong as Garrett's snuff."[81]

(b) Libel, Slander, and Defamation

In *McGehee v. Depoyster*,[82] the Mississippi Supreme Court ruled that the notice of claim provisions of the Governmental Immunity Act[83] did not apply to an action against a school district superintendent alleged to be acting outside the course and scope of his employment when he defamed the plaintiff during a press conference.[84] The court reasoned that the notice provisions of the Act applied only in actions against employees in their official capacities, and since the plaintiff "stepped outside the course and scope of his employment" by slandering the plaintiff before the press, the exceptions to individual immunity contained in the Act[85] obviated the need for pre-suit notice.[86]

However, where a plaintiff fails to allege a defamatory act, the fact that the defendant may have acted in a defamatory fashion *per se* has been held to be insufficient grounds for establishing individual employee liability.[87] In *Foster*, where the plaintiff alleged false arrest by a police officer, the city argued that false arrest amounted to slander *per se*, with the result that the officer, individually, and not the city, should be held liable.[88] The court ruled that the city could not avoid liability for false arrest on grounds that the officer slandered the plaintiff and thus acted in his individual capacity and outside the scope of his employment, because the tort of slander was not "before this court."[89] In other words, since the plaintiff did not plead slander, then the issue of individual liability was never before the court.

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[81] For example, in *Goralski v. Pizzimenti*, 540 A.2d 595, 600 (Pa. Commw. Ct. 1988), the court held that a school district manager could not be held personally liable for publishing a letter outlining a teacher's shoddy work record with malicious intent to deprive her of unemployment benefits, on grounds that (1) there was no direct evidence of malice, (2) the plaintiff prevailed on her unemployment compensation claim did not establish the falsity of the letter, (3) there was no ruling by the compensation authorities that the contents of the letter were false, and (4) the evidence was purely speculative and not such that a jury could base a verdict of malice on it. In so finding, the court gave the individual liability provisions of the Pennsylvania Tort Claims Act, PA. STAT. ANN. tit. 53 & 5311.307 (repealed 1980), a government-friendly, strict-proof-required interpretation. *Goralski*, 540 A.2d at 600.

[82] 708 So. 2d 77 (Miss. 1998).

[83] MISS. CODE ANN. § 11-46-11 (Supp. 1998).

[84] *McGehee*, 708 So. 2d at 80. The court added that the proper way to handle the discipline matter would have been to handle it internally, rather than speaking to the press outside the bounds of governmental employment. *Id.*

[85] MISS. CODE ANN. §§ 11-46-5(2) & 11-46-7(2) (Supp. 1998).

[86] *McGehee*, 708 So. 2d at 80-81. *See also* Ennis v. Crenca, 587 A.2d 485, 490-91 (Md. 1991) (holding that city council member's slanderous statement that plaintiff attempted to bribe her obviated need for service of pre-suit claim notice upon government, as defendant was acting outside course and scope of her employment and individually liable for her slanderous acts).

Apparently, the Mississippi Supreme Court places great emphasis on whether or not the plaintiff has alleged one of the exceptions to individual liability in the complaint. Thus, the court has held that the plaintiff's pleading choices, in concert with the proof adduced, determine whether an employee may be subjected to individual liability.[90] Although it is doubtful that the Legislature intended for the protections of its Governmental Immunity Act to hang upon plaintiffs' pleading choices, our highest court's decisions suggest that those choices are of great legal significance.

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[87] Foster v. Noel, 715 So. 2d 174 (Miss. 1998).

[88] *Foster*, 715 So. 2d at 180.

[89] *Id.* But see *Moore v. Carroll County*, where a federal court ruled that even though the plaintiff did not allege any of the exceptions to individual immunity as provided by section 11-46-7(2) of the Mississippi Code, his allegations that the defendant hired and armed a deputy, knowing the deputy to have inadequate training with firearms, stated a claim for reckless disregard for the plaintiff's rights, which could conceivably warrant a finding of malice, and from which could legally be inferred that a defendant acted with ruthless or reckless disregard for a plaintiff's rights. Moore v. Carroll County, 960 F. Supp. 1084, 1091 (N.D. Miss. 1997). Consequently, the court denied the officer's motion to dismiss the charges against him in his individual capacity. *Moore*, 960 F. Supp. at 1091. Obviously, the federal court was willing to imply an exception based upon a legal definition of that exception, whereas the Mississippi Supreme Court was not in *Foster*. Until the supreme court addresses this issue further, it would be justifiable to presume that *Foster* has greater precedential value regarding this issue than *Moore*.

[90] *Id.* at 1084.

(c) Fraud

Although other state courts have touched upon this issue,[91] our Mississippi appellate courts have yet to rule on the fraud aspect of the individual immunity statutes. However, in light of the foregoing analysis of the five other individual liability acts, any claimant intending to pierce the individual absolute immunity of the governmental employee on the theory that the employee acted outside the course and scope of employment, by virtue of a fraudulent act, would be well advised to plead each and every element of fraud in the complaint and be prepared to offer sufficient proof of each element by the time that the defendant files a motion to dismiss or motion for summary judgment.

4. Governmental Immunity for Individual Acts

As previously explained, when an employee is found to be outside the course and scope of employment by virtue of a malicious or criminal act, the governmental entity is not liable for that employee's actions because it has not waived immunity for such acts.[92] Consequently, if a plaintiff were to sue a governmental entity and its employee for the negligent act of the employee in his individual capacity only, then the governmental entity must be dismissed from the action as there is no respondeat superior liability of the government for its employee's tortious acts outside the course and scope of his employment.[93] Said another way, §§ 11-46-5(2) and 11-46-

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[91] *See* Zuckerman-Vernon Corp. v. Rosen, 361 So. 2d 804, 807 (Fla. Dist. Ct. App. 1978) (holding that mayor's false representations that property was zoned for unit development, which induced signing of contract, subjected mayor, individually, to action for fraud); Hayes v. County of Mercer, 526 A.2d 737, 740 (N.J. Super. Ct. App. Div. 1987) (considering fraud in immunity context, court held that prosecutor's decision to proceed with extradition hearings in face of strong exculpatory evidence was not type of fraud leading to individual liability); DeBry v. Noble, 889 P.2d 428, 442-43 (Utah 1995) (holding that county official could be held personally liable for fraud for issuing fraudulent, misrepresented temporary occupancy permit under provisions of section 63-30-4(3)-(4) of the Utah Code).

[92] *See* MISS. CODE ANN. § 11-46-5(2) (Supp. 1998).

[93] *See* Driskill v. State, 779 S.W.2d 945, 947 (Tex. App. 1989) (holding that

7(2), which provide for individual employee immunity in the course and scope of employment, also serve as exemptions to waiver of immunity for the public entities insofar as tortious acts by employees outside the scope of employment are concerned.

The question remains, then, as to whether a plaintiff may sidestep the government's immunity for an employee's individual, intentional tort act by also alleging another, related negligent act within the scope of employment. An example is where a plaintiff, knowing that the government is immune for an employee's malicious act, pleads that the employee also acted negligently, thereby holding the government also liable. This strategy proved unsuccessful in *Little v. Schafer*,[94] where a federal court was presented with a university student's action against several police officers individually and against two municipalities.[95] The allegations centered upon the cities' negligent hiring of the officers and negligent entrustment to them of nightsticks, with which they assaulted the plaintiff.[96] The municipalities defended on the basis that they were not liable for the individual acts of their employees which "[arose] out of an assault" as per the provisions of the Texas Tort Claims Act exceptions to individual immunity,.[97]

Noting that the plaintiff was attempting to sidestep this statute's provisions "by pretending to base his claim, not on any assault theory, but on the cities' negligence in employing the officers . . . and on the negligent entrustment to them of their nightsticks,"[98] the court decided that the municipalities

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where no waiver of immunity exists, state is exempt from responsibilities of respondeat superior), *judgment rev'd in part*, 787 S.W.2d 369 (Tex. 1990). Section 11-46-5(2) of the Mississippi Code provides that the state does not waive immunity for the tortious acts of its employee acting outside the scope of her employment.

[94] 319 F. Supp. 190 (S.D. Tex. 1970) (applying Texas Tort Claims Act law).

[95] *Little*, 319 F. Supp. at 191.

[96] *Id.* at 191-92.

[97] The Texas Tort Claims Act provides that the government was immune from liability for any act "arising out of an assault." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057 (West 1997).

[98] *Little*, 319 F. Supp. at 191-92.

could not be held liable for negligent hiring because the claim of negligent hiring "[arose] out of" the subsequent assault.[99] The *Little* court eloquently concluded the plaintiff would not be allowed "to procure by indirection what forthrightness could not effect."[100] In so deciding, the court looked to Federal Tort Claims Act precedent, including a case where the Fifth Circuit had ruled that a plaintiff could not sidestep that Act's assault exception to individual immunity, and hold the government liable for an employee's intentional act of assault, by pleading a count of negligent shooting in the course and scope of employment.[101]

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[99] *Id.* at 192.

[100] *Id.*

[101] *Id.* (citing United States v. Faneca, 332 F.2d 872, 875 (5th Cir. 1964) (interpreting 28 U.S.C. § 2680 of Federal Tort Claims Act, which immunizes government from employees' acts "arising from" assault and battery)). *See also* Gaudet v. United States, 517 F.2d 1034, 1035 (5th Cir. 1975) (holding plaintiff's allegation of negligence in police procedure barred by false arrest and malicious prosecution exemptions); Quinones v. United States, 492 F.2d 1269, 1276, 1280 (3d Cir. 1974) (holding plaintiff's allegation of negligent maintenance of his personnel records defeated by exemption denying government's liability for defamation).

But see Zerbe v. State, 578 P.2d 597, 600-01 (Alaska 1978) (noting situation where plaintiff alleged state's employees negligently failed to inform judge that plaintiff's case had been dismissed, resulting in judge's issuance of bench warrant for plaintiff's failure to appear at hearing). In *Zerbe*, the State argued that although the complaint was couched in negligence, the plaintiff's cause of action actually arose out of false arrest and imprisonment and was consequently barred by an Alaska Tort Claims Act exemption. *Zerbe*, 578 P.2d at 598. *See* ALASKA STAT. § 09.50.250 (Lexis 1998) (providing that "no action may be brought . . . if the claim (3) arises out of assault, battery, false imprisonment, false arrest" or several other intentional torts, including libel, slander, and deceit). Conceding that a majority of courts' decisions interpreting a similar exemption of the Federal Tort Claims Act favored the defendant's position that the gravamen of the plaintiff's claim was false arrest and imprisonment, not negligence, the court nevertheless followed the minority rule and denied the defendant's motion to dismiss based upon the exemption. *Zerbe*, 578 P.2d at 601. Utilizing a proximate cause analysis, the court reasoned the plaintiff's false arrest was a foreseeable and proximate result of the government's negligent record-keeping and the intentional tort was not an intervening act that would sever the necessary causal relations between the original negligence and the plaintiff's injury. *Id.* at 600. The question, in light of these cases, is whether the Mississippi courts will apply the majority or the minority rule.

5. Course and Scope of Immunity Defined

When governmental employees engage in acts or omissions which do not comprise any of the exceptions set out in § 11-46-7(2), but those actions warrant doubt as to whether they occurred in the "course and scope" of governmental employment, may that employee be held individually liable for those acts?[102] For example, when a state trooper drives his cruiser to work in the morning, or when a teacher drives her personal vehicle on school business, are they acting in the course and scope of their employment for purposes of the Act? The crucial issue in such cases may turn out to be how "course and scope of employment" is defined for purposes of actions brought under the purview of the Governmental Immunity Act.

Unfortunately, the definition of "scope of employment" is, as Prosser has so eloquently stated, a "highly indefinite phrase . . . so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions."[103] Fittingly, although Mississippi's Immunity Act establishes a presumption of employment during time and place and sets forth several specific examples of non-employment, it offers no concise definition of "scope of employment."[104] And though we may look to other jurisdictions for examples of which questionable acts are considered to be in the "course and scope of employment," such a review will be hampered by conflicting results obtained because of varying definitions of "course and scope of employment."[105] However, as our supreme court has yet to provide a precise definition for purposes of the Act,[106] we have no choice but to begin our analysis by reviewing the definitions of "course and scope of employment" as promulgated by other state courts.

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[102] *See* Donald T. Kramer, Annotation, *Federal Tort Claims Act: When Is Government Officer or Employee "Acting Within the Scope of His Office or Employment" for Purposes of Determining Government Liability Under 28 U.S.C. § 1346(b),* 6 A.L.R. FED. 373 (1971 & Supp. 1998) (discussing various federal courts' approaches to this issue in Federal Tort Claims Act context).

[103] WILLIAM L. PROSSER, THE LAW OF TORTS § 69, at 472-73 (3d ed. 1964).

[104] As does the Iowa Tort Claims Act, which provides that "if the act or omission reasonably relates to the business or affairs of the municipality and the officer, employee, or agent acted in good faith and in a manner a reasonable person would have believed to be in and not opposed to the best interests of the municipality." IOWA CODE § 670.2 (1998). Mississippi's federal courts have also passed on the opportunity to provide a clear cut definition of "scope of employment" in the Act's context. In *Franklin v. Calhoun County,* Judge Neal Biggers, Jr., ruled that a sheriff's failure to supervise inmates and protect them from assault by other inmates occurred in the course and scope of his duties as per section 11-46-7(2) of the Mississippi Code, but did not define "course and scope" for purposes of that statute. Franklin v. Calhoun County, 3:96CV143-B-B,

Adopting a workers' compensation totality of the circumstances analysis for tort claims act guidance, a Colorado court declared that an employee's travel from his home to the Governor's mansion occurred within the scope of employment, where the travel was requested by and paid for by the employer and conferred a benefit upon the employer.[107] A California court offered a more detailed definition, stating that

> [f]or purposes of the [Tort Claims Act], a public employee is acting in the course and scope of his employment when he is engaged in work he was employed to perform or when the act is incident to his duty and was performed for the benefit of his employer, and not to serve his own purposes or conveniences . . . . The phrase "scope of employment" has been equated with the express or implied power of the public employee to act in a particular instance, and . . . we are to look

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1997 WL 206765, at *2 (N.D. Miss. 1997).

[105] *See, e.g.*, Capra v. Tucker, 857 P.2d 1346, 1348 (Colo. Ct. App. 1993) (holding that state trooper was in course and scope of his employment for purposes of applicable tort claims act when he drove his patrol car from his home to governor's mansion); Krieger v. Just, 876 P.2d 754, 760 (Or. 1994) (ruling that principal driving from her school to meeting place to perform non-related activity was not in course and scope of her employment). Of course, as noted previously, Colorado and Oregon feature differing definitions of "course and scope" of governmental employment.

[106] And nor have our federal courts. *See Franklin*, 1997 WL 206765, at *2 (ruling sheriff's failure to supervise inmates and protect them from assault by other inmates occurred in course and scope of his duties).

[107] *Capra*, 857 P.2d at 1348. The Colorado courts have extended this doctrine to cover an off-duty police officer for negligent maintenance of a K-9 dog where the officer was required by departmental policy to keep the dog at his house. Kliewer v. Sopata, 797 F. Supp. 1569, 1570 (D. Colo. 1992) (applying Colorado Tort Claims Act law).

> not to the nature of the act itself, but to the purpose or result intended. . . . If the object or end to be accomplished is within the employee's express or implied authority his act is deemed to be with the scope of his employment, irrespective of its wrongful nature.[108]

Indiana's courts, in requiring a causal connection between the plaintiff's injury and the defendant's governmental employment, have phrased their definition in the negative, saying that "[a]n employee cannot be said to be acting within the scope of his employment where the act is done on the employee's own initiative and not in the service of the employer."[109] Oregon's analysis also focuses on the employee's motivations, declaring that "we consider whether the act in question is of a kind [the employee] was hired to perform, whether the act occurred within the authorized time and space and whether the employee was motivated, at least in part, by a purpose to serve the employer."[110]

Maryland's courts focus upon both the employee's and employer's motivations, declaring that

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[108] Neal v. Gatlin, 111 Cal. Rptr. 117, 120 (Cal. Ct. App. 1973). *See* Fowler v. Howell, 50 Cal. Rptr. 2d 484 (Cal. Ct. App. 1996) (holding libel and malicious prosecution to be within the scope of employment of worker who had been encouraged by superiors to file sexual harassment complaint against plaintiff co-worker).

[109] VanValkenburg v. Warner, 602 N.E.2d 1046, 1049-50 (Ind. Ct. App. 1992).

[110] Brungardt v. Barton, 685 P.2d 1021, 1023-24 (Or. Ct. App. 1984). This rather liberal definition of scope of employment is similar to California's, which encompasses acts "that may be fairly regarded as typical of or broadly incidental to the enterprise undertaken by the employer," as noted in *Perez v. Van Groningen & Sons, Inc.*, 719 P.2d 676, 679 (Cal. 1986), which held that even conduct that violates a superior's express orders or amounts to an intentional tort may be found in some circumstances to be within the course and scope of employment. For example, where a store employee is ordered not to resist robbery attempts, but fires on robbers injuring them, or where one worker injures another with a hammer during a work-related argument, such employees may be held to have acted in the course of their employment. *See, e.g.,* Wilson v. Drake, 87 F.3d 1073 (9th Cir. 1996), *cert. denied,* 507 U.S. 930 (1997); Carr v. William C. Crowell Co., 171 P.2d 5 (Cal. 1946); Frederick v. Collins, 378 S.W.2d 617 (Ky. 1964).

> the overall test is whether the tortious acts were done by the [employee] in furtherance of the employer's business and were such as may fairly be said to have been authorized by him. By "authorized" is not meant authority expressly conferred, but whether the act was such as was incident to the performance of duties entrusted to the employee by the employer. . . . Moreover, where the employee's actions are personal, or where the employer is acting to further his own interests, the conduct is normally outside the scope of employment.[111]

These definitions all encompass parts of the definition ascribed to "in the course and scope of employment" by Mississippi courts deciding workers' compensation issues. In *Big "2" Engine Builders v. Freeman,*[112] the Mississippi Supreme Court defined "arising out of employment" as a "causal connection between the employment and the injury,"[113] and defined "in the course of employment" as "whenever the injury resulted from activity which is (1) in its overall contours actuated [partly] by a duty to serve the employer, or (2) reasonable incidental to the employment."[114] Applying Mississippi workers' compensation law, the Fifth Circuit, in *Jefferson v. T.L. James & Co.,*[115] cited textbook law[116] to the effect that an injury occurs "in the course of employment" when it happens at the work place during work hours, while the employee is fulfilling his employment duties or doing something incidental thereto.[117] Applying general Mississippi master and servant law, the Fifth Circuit declared that for an action to be within the scope of employment, the agent's conduct must be actuated in part by a purpose to serve the master.[118]

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[111] Ennis v. Crenca, 587 A.2d 485, 489 (Md. 1991) (finding that city council member did not act in scope of her employment by slanderously accusing member of citizen's group of attempting to bribe her).

[112] 379 So. 2d 888 (Miss. 1980).

[113] *Freeman,* 379 So. 2d at 890.

[114] *Id.*

[115] 420 F.2d 322 (5th Cir. 1969).

[116] *See* 58 AM. JUR. *Workmen's Compensation* § 212; 1 LARSON, WORKMEN'S COMPENSATION LAW § 14.00 (1997).

[117] *Jefferson,* 420 F.2d at 324.

[118] Entente Mineral Co. v. Parker, 956 F.2d 524, 528 (5th Cir. 1992). *See also*

The common threads running through these definitions appear to be (1) a causal connection between the defendant's governmental employment and the plaintiff's injury, (2) performance of work the employee was hired to do, or something reasonably incidental thereto, (3) acts authorized by or for the benefit of the employer, and/or (4) acts or omissions occurring during the time and at the place of employment. The first three are consistent with Mississippi's workers' compensation definition of "course and scope," and also evince language utilized by courts interpreting other tort claims act "course and scope" provisions, while number four mirrors the rebuttable presumption established by section 11-46-7(7) of the Mississippi Code.

Whether or not the Mississippi Supreme Court utilizes a similar analysis when it defines "course and scope of employment" in the Governmental Immunity Act context, its definition will provide much-needed guidance to anyone attempting to answer whether the defendant acted in the scope of governmental employment, where a serious question exists as to whether his acts or omissions were job-related but did not fall within the exceptions to employment cited in § 11-46-5(2) of the Mississippi Code.

B. *Exemptions to Waiver of Immunity*

The British doctrine of sovereign or governmental immunity was imported to the new American government both as to the federal and state governments.[119] Consequently, "neither the state nor the federal government [was] liable for torts committed in its service by its officers and employees unless it [consented] to such liability."[120] Although the King's officers were generally immune from liability when carrying out his commands, Parliamentary ministers were not immune insofar

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Odier v. Sumrall, 353 So. 2d 1370, 1372 (Miss. 1978) (holding test for determining scope of employment is whether act was done as means to accomplish purposes of master or in furtherance of his business).

[119] RESTATEMENT (SECOND) OF TORTS § 895 (1965).

[120] James Fleming, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 610 (1955).

as their illegal acts were concerned.[121] Furthermore, the Anglo-Saxon tradition did not include a general theory of immunity on the part of lower-level public officials.[122]

In modern times, the question arose as to the extent of immunity accorded to all government officials and employees. Ultimately, a compromise doctrine was reached wherein government officials could be held liable for the negligent performance of ministerial functions, but not discretionary functions.[123] Discretionary immunity developed as a logical extension of judicial, legislative and administrative immunity on the same theory of avoiding the "evils that would flow from inhibiting courageous and independent official action, and deterring responsible citizens from entering public life."[124]

Mississippi originally adopted a government function/proprietary approach to governmental immunity[125] and a qualified immunity test as to individual employee immunity. Pursuant to this latter doctrine, public officials were only held personally liable for negligence in the course of ministerial acts, discretionary acts where they greatly exceeded their authority, or for intentional torts.[126] However, the passage of the Governmental Immunity Act in 1993 brought absolute immunity to public officials and employees while acting in the course and scope of their employment[127] and provided public entities with twenty-three exemptions from Mississippi's waiver of immunity, including the familiar discretionary exemption. As is the case with many other states' discretionary exemptions, no definition of "discretionary" may be found in our exemption statute.

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[121] RESTATEMENT (SECOND) OF TORTS § 895D (1965).

[122] Fleming, *supra* note 120, at 635.

[123] RESTATEMENT (SECOND) OF TORTS § 895D (1965). Or, as quoted by Dicey in his *Law of the Constitution* 193 (9th ed. 1945), "[w]ith us, every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."

[124] Fleming, *supra* note 120, at 643.

[125] *See, e.g.,* Nathaniel v. City of Moss Point, 385 So. 2d 599, 601 (Miss. 1980) (holding absolute immunity granted for government functions, but no immunity for proprietary acts).

[126] *See, e.g.,* Starnes v. City of Vardaman, 580 So. 2d 733, 737 (Miss. 1991) (holding that plaintiff failed to demonstrate that city officials acted beyond authority or committed intentional tort).

[127] *See supra* note 34 and accompanying text.

Section 11-46-9 of the Mississippi Code provides the Act's exemptions to the general waiver of immunity granted by the Act.[128] These exemptions serve as absolute,[129] jurisdictional[130] defenses. Where any one of them applies, there is no waiver of immunity, and the governmental entity is absolutely immune from any state tort action. The legal justification for this absolute immunity stems from the need for the government to be protected from liability for employees' acts performed in the course of carrying out a uniquely government (and not private) function.[131] Although each individual exemption warrants its own in-depth analysis and interpretation, there are five general rules pertaining to all the exemptions which may provide further insight into their nature and scope.

1. General Rules Pertaining to Exemptions

(a) Exemptions Liberally Construed in Favor of the Government

Any exemption written into a state tort claims act functions as a jurisdictional bar wherever it applies.[132] Consequently, the first question concerns whether exemptions are to be construed liberally or conservatively. The rulings of a sister state may shed some light upon this matter.

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[128] *See* MISS. CODE ANN. § 11-46-5(1) (Supp. 1998).

[129] *See* Hartzler v. City of San Jose, 120 Cal. Rptr. 5, 9 (Cal. Ct. App. 1975) (stating police protection exemption provides absolute immunity).

[130] *See* Dalehite v. United States, 346 U.S. 15, 31-32 (1953) (holding that discretionary exemption serves as jurisdictional prerequisite to suits brought under Federal Tort Claims Act, which plaintiff must satisfy as part of his burden of establishing subject-matter jurisdiction); Calderon v. United States, 123 F.3d 947, 950-51 (7th Cir. 1997) (same); Miller v. United States, 710 F.2d 656, 662-63 (10th Cir. 1983) (same); Morris v. United States, 521 F.2d 872, 874 (9th Cir. 1975) (same); Konecny v. United States, 388 F.2d 59, 62 (8th Cir. 1967) (same). *But see* Stewart v. United States, 199 F.2d 517, 519-20 (7th Cir. 1952) (citing minority rule that exemptions are merely defenses that may be raised, not jurisdictional prerequisites).

[131] *Dalehite*, 346 U.S. at 31.

[132] *See* Carpenter v. Johnson, 649 P.2d 400, 400-402 (Kan. 1982) (holding "signing exception" to Tort Claims Act prohibited plaintiff's action against government for failure to post sign warning of curb); *see also* Wooten v. South Carolina Dep't of Transp., 485 S.E.2d 119, 122 (S.C. 1997) (stating that under minority rule, exemptions are merely affirmative defenses, not jurisdictional defenses), *affirmed*

Mississippi patterned its Governmental Immunity Act in part upon that of South Carolina's. Specifically, thirteen of the Mississippi Act's exemptions were drawn almost verbatim from South Carolina's.[133] These similarities are made relevant to our discussion by boilerplate tort claims act law providing that when one legislature adopts the tort claims act statute of another jurisdiction, a presumption arises that it also adopts the prior construction of that statute by the first state's courts.[134] Consequently, as the South Carolina courts have previously held,[135] Mississippi's Immunity Act exemptions should be lib-

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as modified, 1998 WL 951235 (S.C. Jan. 18, 1999). Since exemptions constitute jurisdictional defenses, they may be raised at any time in the proceedings, and the plaintiff bears the burden of proof that the court has subject-matter jurisdiction of the action after the government raises a jurisdictional exemption defense. Delk v. City of Grand Junction, 958 P.2d 532, 533 (Colo. Ct. App. 1998). *See also* Hernandez v. McClanahan, 996 F. Supp. 975, 977 (N.D. Cal. 1998) (recognizing plaintiff bears burden of proof that court has subject-matter jurisdiction of action after government raises a jurisdictional exemption defense); Brock v. Nyland, 955 P.2d 1037, 1043 (Colo. 1998) (same).

[133] MISS. CODE ANN. § 11-46-9(1) (Supp. 1998). Specifically, subsections (a), (b), (d), (e), (h), (i), (k), (l), (o), (p), (q), (t), and (u) of the Mississippi Code were taken directly from South Carolina law. The major distinctions between the two state's exemptions are that South Carolina's last ten exemptions bear no resemblance to any of Mississippi's, and South Carolina has an exemption covering acts constituting fraud, malice and criminal intent, while the Mississippi scheme does not. Interestingly, the Mississippi Legislature took South Carolina's "fraud, malice, and criminal intent" exemption and transformed it into its exception to absolute individual immunity found in section 11-46-7(2) of the Mississippi Code. Nevertheless, this statute has the same force and effect of an exemption insofar as governmental entities are concerned, because it states that where an employee acts with malice, fraud, slander, etc., the public entity employing him has not waived immunity for such acts.

[134] Doe v. Durtschi, 716 P.2d 1238, 1244 (Idaho 1986). *See* David J. Klinger & Gene Truncallito, *A Review of the New Jersey Tort Claims Act: Notice Provisions, Damages, and Third Party Claims*, 2 SETON HALL LEGIS. J. 50, 56 (1976) (analyzing notice provisions of New Jersey Tort Claims Act and specifically, problems involving damages and third-party claims).

[135] *See* Rice v. School Dist. of Fairfield, 452 S.E.2d 352, 354 (S.C. Ct. App. 1994) (holding that Tort Claims Act exemptions warrant liberal, government-friendly interpretation); *see also Gardner v. Biggart*, 417 S.E.2d 858, 859-60 (S.C.

erally construed in favor of limiting the liability of the State and its political subdivisions, although the burden of establishing the application of one of the exemptions to any case rests squarely on the shoulders of the governmental entity asserting their application.[136]

Thus far, the Mississippi Supreme Court has indeed interpreted the Act's provisions in favor of limiting pubic entities' liabilities. As previously noted herein, the court has ruled that the notice provisions are jurisdictional[137] and has given a government-friendly interpretation to § 11-46-9(1)(c) of the Mississippi Code, the police protection exemption, holding that the "reckless disregard" with which an officer must act to be held liable for negligent acts in the course of police protection must be an "intentional act."[138] It would certainly appear that the court, in its attempt to comply with legislative intent, is construing the Act's provisions liberally in favor of governmental immunity.

1992) (same).

[136] *Rice*, 452 S.E.2d at 354. However, in *Gerber v. Neveaux*, 578 N.W.2d 399, 403 (Minn. App. 1998), it was held that once the government asserts immunity, the plaintiff has the burden to specifically articulate the factual basis for any claim that must be scrutinized to determine immunity, and the government is entitled to an immediate determination of immunity by the trial court as trier of fact. This burden-shifting analysis is similar to the burden-shifting analysis utilized by federal courts in regard to the heightened pleading standard, which shifts the burden of pleading specific reasons that qualified immunity does not apply to plaintiffs in § 1983 Civil Rights actions. *See, e.g.,* Jacquez v. Procunier, 801 F.2d 789, 792-93 (5th Cir. 1986) (holding plaintiff failed to allege facts to support § 1983 civil rights claim).

[137] *See* City of Jackson v. Lumpkin, 697 So. 2d 1179, 1181 (Miss. 1997) (barring action because motorist did not meet notice requirements of section 11-46-11 of Mississippi Code), *overruled in part by* Carr v. Town of Shubuta, 96-CT-01266-SCT, 1999 WL 62772 (Miss. Feb. 11, 1999). In *Carr*, the Mississippi Supreme Court adopted a substantial compliance standard. *Carr*, 1999 WL 62772, at *2; *see also* Carpenter v. Dawson, 701 So. 2d 806, 808 (Miss. 1997) (barring suit because attorney's two-sentence letter to city's liability carrier did not contain information required by section 11-46-11 of Mississippi Code), *overruled in part by* Carr v. Town of Shubuta, 96-CT-01266-SCT, 1999 WL 62772 (Miss. Feb. 11, 1999).

[138] Turner v. City of Ruleville, 95-CA-00880-SCT, 1999 WL 161301, at *4-5 (Miss. Mar. 25, 1999).

(b) Application of Exemptions to Constitutional Torts

Although the procedural provisions of Mississippi's Governmental Immunity Act are inapplicable to various federal civil rights actions such as those brought pursuant to Title VII and 42 U.S.C. § § 1981 and 1983,[139] the Act's provisions, including the procedural and exemption sections, have full application to actions alleging constitutional torts in which damages are requested.

In *State v. Hinds County Board of Supervisors*,[140] Hinds County brought an action against the State seeking damages for losses resulting from the application of an allegedly unconstitutional statute.[141] Rejecting the County's claim, the Mississippi Supreme Court declared that "when the [State or political subdivision] is sued to determine whether a statute or action is unconstitutional, the [State or political subdivision] cannot be held liable for damages if the conduct falls within one of the exceptions found in section 11-46-9 of the Mississippi Code."[142] Although the court ruled that actions seeking solely to declare statutes unconstitutional are not subject to sovereign immunity, any claims seeking damages as a result of an allegedly unconstitutional statute are subject to the Act's provisions and protections, including the exemptions to liability.[143]

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[139] Felder v. Casey, 487 U.S. 131, 153 (1988). The decision settled the controversy between the federal circuits as to whether state tort claims act notice requirements applied to § 1983 civil rights actions. *Felder*, 487 U.S. at 153.

[140] 635 So. 2d 839 (Miss. 1994).

[141] *Hinds County Bd. of Supervisors*, 635 So. 2d at 840. The plaintiffs alleged the statute setting reimbursement to the county for state inmates at ten dollars per day was unconstitutional. *Id.* at 841.

[142] *Id.* at 842 (citing exemptions (a), (d), (f), and (o) as exemptions which could apply to immunize the State).

[143] *Id.* Hinds County objected to a state statute that required the State to pay ten dollars to the county for each state prisoner housed in county facilities. *Id.* at 841.

(c) Disjunctive Nature of Exemptions

In *Hinds County Board of Supervisors*, the court found the State was immune from liability for damages because any one of four separate exemptions may have applied to defeat the plaintiff's action.[144] In so doing, the court followed its own reasoning in a previous unpublished decision, *Hall v. Mississippi Department of Public Safety*,[145] to the effect that "[section 11-46-9] is written in the disjunctive which indicates that subsections (1)(c) and (1)(d) should not be read together, but should be read as alternatives separate and apart from one another."[146] Thus, the *Hall* court rebuffed a plaintiff's argument that subsections (c) and (d), the police protection and discretionary exemptions, should be read together so that if the discretionary exemption did not apply to defeat his action, then the police protection exemption was inapplicable.[147]

This is consistent with decisions in other states which have held that if any one exemption applies to the facts of a plaintiff's case, then the plaintiff's action is barred by the exemption's cloak of non-waiver of immunity, notwithstanding the fact that one or more of the other exemptions do not apply.[148] In other words, the various exemptions are like an octopus's arms; even if one doesn't get you, another one may.

Consequently, should a plaintiff's vehicle pass through a "T" intersection and run off the roadway into a ditch bordering the head of the "T" where no stop signs or other warnings advised that the roadway ended suddenly, the governmental entity responsible for the intersection could conceivably raise numerous exemption defenses, insofar as they were factually apposite. These defenses could include (1) that a discretionary decision was made not to place a warning device, as per exemption (d), (2) that the accident was caused by weather conditions, i.e., an icy roadway as per (q), (3) that the entity was unable to place a warning device due to lack of resources as per subsection (g), (4) that the intersection conforms to design standards as per subsection (h), (5) that the entity had no actual or constructive notice that the sign was down as per subsection (v), and/or (6) that the sign was knocked down by a third party as per subsection (w). If any one of these exemptions were found to be applicable, then the governmental entity would be absolutely immune from liability for the plaintiff's injuries.

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[144] *Id.* at 842.

[145] 96-CA-00832-SCT (Miss. Apr. 9, 1998) (Justice Smith presiding en banc) (decision without precedential value).

[146] *Hall,* 96-CA-00832-SCT, slip op. at 8.

[147] *Id.*

[148] *See, e.g.*, Cadena v. Chicago Fireworks Mfg. Co., 697 N.E.2d 802, 810-11 (Ill. Ct. App. 1998) (holding exemptions must be read in disjunctive); Baumgardner v. Southwest Va. Mental Health Inst., 442 S.E.2d 400, 402 (Va. 1994) (same); *see also* Bingham v. Idaho Dep't of Transp., 786 P.2d 538, 540-41 (Idaho 1989) (pleading multiple exceptions); Kolitch v. Lindedahl, 497 A.2d 183, 189 (N.J. 1985) (same); State v. Terrell, 588 S.W.2d 784, 788-89 (Tex. 1979) (same); Alvarado v. City of Brownsville, 865 S.W.2d 148, 155-56 (Tex. App. 1993) (same), *rev'd* 897 S.W.2d 750 (Tex. 1995).

(d) Exemptions May Override Exceptions to Individual Liability

As previously noted in this article, acts such as malice, libel, and fraud remove individual governmental employees from the umbrella of individual absolute immunity. But what if the malicious act perpetrated by an employee was specifically covered by one of the Governmental Immunity Act's exemptions from waiver of immunity? Suppose, for example, that a judge made an obviously malicious ruling, or a legislator maliciously voted in favor of a bill. Which would determine the judge's or legislator's fate, the exemption from liability or the exception to individual immunity?

This very issue was faced by a New Jersey court in *Timber Properties, Inc. v. Township of Chester.*[149] In *Timber Properties,* a land developer brought a tortious interference with contract action against members of a municipal planning board for arbitrarily and capriciously passing a zoning amendment which resulted in the denial of the developer's proposed project.[150] Although the New Jersey Tort Claims Act contained an exemption[151] which provided absolute immunity for "legislative or judicial action, or inaction, or administrative action or inaction of a legislative or judicial nature," the plaintiff alleged that the individual board members were nevertheless individually liable for maliciously amending a zoning ordinance solely for the purpose of impeding the developer's project and interfering with his contract with lot purchasers.[152] The plaintiff based his allegation upon the New Jersey Act's individual immunity exception statute,[153] which provided that a governmental employee would not be individually immune for conduct that "was outside the scope of his employment or constituted a crime, actual fraud, actual malice, or willful misconduct."[154] Faced with potentially conflicting exemption and individual immunity exception statutes, the New Jersey court looked to the common law as it existed prior to the passage of the Tort Claims Act, and determined that since the common law rule of absolute immunity from monetary liability for legislative acts had been preserved under the Act's exemption statute, the Legislature intended for municipal legislative officials to be absolutely immune from suits alleging malicious voting.[155] The court then affirmed dismissal of the plaintiff's malicious interference with contractual relations claims.[156]

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[149] 500 A.2d 757 (N.J. Super. 1984).

[150] *Timber Properties,* 500 A.2d at 764.

The *Timber Properties* decision stands for the general proposition that a legislature's preservation of a common law immunity in a tort claims act exemption evinces an intent to include that immunity in the tort claims act context. However, the *Timber Properties* rule only applies to the common law immunities which existed prior to the passage of a tort claims act and which were preserved by that act in the form of exemptions to waiver of immunity. Only preserved common law immunities suffice to override an Act's exceptions to individual immunity. In Mississippi, such exemptions may include subsections (a) through (i),[157] (p),[158] and (r),[159] since those consist of absolute or qualified immunities that existed prior to the passage of Mississippi's Governmental Immunity Act.

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[151] N.J. STAT. ANN. § 59:3-2(b) (West 1992). The statute is identical to section 11-46-9(1)(a) of the Mississippi Code.

[152] *Timber Properties*, 500 A.2d at 764.

[153] N.J. STAT. ANN. §§ 59:3-14(a) (West 1998). The statute is very similar to section 11-46-7(2) of the Mississippi Code.

[154] *Timber Properties*, 500 A.2d at 765.

[155] *Id.*

[156] *Id.* at 766; *see also* O'Laughlin v. Windham, 498 S.E.2d 689, 691 (S.C. Ct. App. 1998) (holding that Tort Claims Act judicial immunity exemption overrides exception to individual immunity, so judge could not be held personally liable for malicious issuance of warrant).

(e) Purchase of Liability Insurance Does Not Waive Exemptions

Prior to the passage of the Governmental Immunity Act in April 1993, § 11-46-16(2) of the Mississippi Code provided that immunity from tort suits was waived by any governmental entity's purchase of liability insurance, but only to the extent of the amount of insurance purchased. Although this meant that an entity's purchase of liability insurance waived immunity for purposes of tort claims against it, the Mississippi Supreme Court later ruled that a municipality's participation in a self-insurance fund did not suffice to waive its immunity since a self-insurance fund was not "insurance coverage."[160] The court also decided that an entity's purchase of insurance did not waive immunity for acts not covered in the insurance policy.[161]

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[157] *See, e.g.,* Loyacono v. Ellis, 571 So. 2d 237, 238 (Miss. 1990) (finding judicial immunity); McFadden v. State, 542 So. 2d 871, 875 (Miss. 1989) (finding lack of resources immunity); Robinson v. Indianola Mun. Separate Sch. Dist., 467 So. 2d 911, 915 (Miss. 1985) (granting discretionary immunity); Woodland Hills Conservation Ass'n v. City of Jackson, 443 So. 2d 1173, 1185 (Miss. 1983) (granting legislative immunity); DeBry v. Noble, 889 P.2d 428, 441 (Utah 1995) (holding licensing decisions are essential government functions and absolutely immune at common law).

[158] *See, e.g., Robinson*, 467 So. 2d at 915 (granting plan or design immunity).

[159] *See, e.g., McFadden*, 542 So. 2d at 875 (finding lack of prison resources immunity).

[160] Mosby v. Moore, 716 So. 2d 551, 555-56 (Miss. 1998). *Accord* Perry v. Nationwide Gen. Ins. Co., 700 So. 2d 600, 601 (Miss. 1997) (holding that municipal plan is not insurance).

[161] Mississippi Transp. Comm'n v. Jenkins, 699 So. 2d 597, 599-600 (Miss. 1997). The court held that an agency's purchase of insurance to cover its employee's negligent driving did not waive immunity for purposes of an action for

However, the provisions of § 11-46-16(2) of the Mississippi Code expired and became of "no force or effect from and after July 1, 1993 [for the state] . . . and October 1, 1993 [for the political subdivisions]."[162] The only relevant insurance purchasing requirements of the Act are contained in § 11-46-17, which became effective April 1, 1993. That section's subsections (1) and (3) established the State's Tort Claims Fund and mandated that all political subdivisions purchase liability insurance sufficient to cover all risks of claims for which they may be liable. Subsection (4) allowed the governmental entities the option of purchasing liability insurance to cover claims in excess of the amounts provided for by § 11-46-15,[163] and further provided that any such entity could be sued for such excess amounts only to the extent of excess coverage.

The question may arise, therefore, as to whether a governmental entity's purchase of liability insurance waives any of the protections of the Act, including any provided by the exemptions.[164] In answering that question, courts in other states have looked to the wording of the applicable tort claims act statutes, often determining that a public entity's or employee's purchase of insurance did not waive sovereign immunity.[165] Looking at § 11-46-17(4), we find no expression of

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an employee flagman's negligent signaling. *Id. See* Dickens v. Thorne, 429 S.E.2d 176, 179 (N.C. Ct. App. 1993) (holding that where insurance policy excludes acts by employees in their individual capacity, such as libelous acts, entity's purchase of liability coverage does not waive immunity for employee's libelous act).

[162] MISS. CODE ANN. § 11-46-16(4) (Supp. 1998).

[163] Or in excess of $50,000 before July 1, 1997, and in excess of $250,000 after July 1, 1997.

[164] As noted previously in the procedural provisions section above, in *Reaves v. Randall*, No. 97-CA-00982-SCT, 1998 WL 909578, at *4 (Miss. Dec. 31, 1998), the court held that the purchase of insurance does not waive compliance with the Act's notice requirements.

[165] *See, e.g.*, Gilbert v. Richardson, 440 S.E.2d 684, 686 (Ga. Ct. App. 1994) (holding county's participation in self-insurance fund did not waive its sovereign immunity and protection of discretionary exemption as per wording of Tort Claims Act insurance purchase statute), *vacated*, 458 S.E.2d 405 (Ga. Ct. App. 1995); Doucette v. City of Lewiston, 697 A.2d 1292, 1294-95 (Me. 1997) (holding city did not waive immunity by participating in self-insurance funded pool); Nelson v. House, 402 N.W.2d 639, 642 (Minn. 1987) (holding employee's purchase of private liability policy with his own funds did not waive municipality's immunity where

legislative intent to establish a waiver of immunity by virtue of an entity's purchase of basic, non-excess liability coverage for the amounts provided for in § 11-46-15 of the Mississippi Code.[166] Indeed, the language of the old § 11-46-16 of the Mississippi Code, which provided for waiver immunity for purchase of any insurance, is noticeably absent from § 11-46-17 of the Mississippi Code.[167]

As to whether the exemptions are lost in the latter section's waiver of immunity upon purchase of excess coverage, the answer may lie in the Legislature's expression that immunity is waived only "to the extent of such excess [liability] insurance carried."[168] In *Brewer v. Independent School District #1*,[169] an Oklahoma court ruled that "'extent of coverage' refers to not only the dollar amount available under the policy, but also the risks insured against by the policy."[170] In other words, where the entity's insurance policy contains language to the effect that the insurer will pay only those amounts that it is legally obligated to pay, or those where liability is imposed by law, then that insurer is not liable to pay any claim which is barred by the application of a tort claims act exemption.

In *Brewer,* the court specifically ruled that the Oklahoma Tort Claims Act exemptions regarding attractive nuisance, failure to make inspection, and product liability were not waived by the school district's purchase of liability coverage, where the Tort Claims Act provided that immunity was waived by purchase of insurance "to the extent of coverage" and the district's policy stated the company would pay "all sums which the [city] shall become legally obliged to pay by reason of liability imposed by law . . . ."[171] The court reasoned that the policy stated the coverage included all liabilities imposed by the Governmental Tort Claims Act, that "[c]learly, the policy did not intend to insure those injuries for which the School would not be liable under the Act," and the exemption law barred all of the plaintiff's claims for attractive nuisance and failure to inspect.[172]

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§ 466.06 of Minnesota Code provided that only governmental entity's purchase of coverage waived immunity); Cairl v. State, 323 N.W.2d 20, 26-27 (Minn. 1982) (holding employees' purchase of liability coverage did not waive immunity and protections of discretionary exemption, where §§ 3.736(8) and 466.06 of Minnesota Code provided that only purchase of insurance by "state agency" waived immunity); Womble v. Singing River Hosp., 618 So. 2d 1252, 1259 (Miss. 1993) (holding hospital's requirement that doctors purchase malpractice insurance did not waive hospital's immunity); Redding v. State, 882 P.2d 61, 64 (Okla. 1994) (holding state's purchase of professional liability coverage for individual prison doctors did not waive immunity because title 57, § 553 of Oklahoma Statutes provided that only purchase of indemnity policy waived immunity and said nothing about purchase of professional liability policy).

[166] Currently this is for coverage up to $250,000.

[167] *See* MISS. CODE ANN. § 11-46-17(4) (Supp. 1998).

[168] *Id.*

[169] 848 P.2d 566 (Okla. 1993).

[170] *Brewer*, 848 P.2d at 569.

Considering the *Brewer* court's reasoning in concert with the "extent of insurance carried" provisions of § 11-46-17(4) of the Mississippi Code,[173] it may reasonably be assumed that where a governmental entity's insurance policy provides that it will pay only such claims as the entity is legally obligated to pay, or where there is a liability imposed by law, then that entity may not be held liable for an act that is immunized by one of the exemptions. Consequently, attorneys representing political subdivisions which purchase liability insurance should advise their clients to obtain only such policies that contain the "legally obliged to pay" language.

(f) Exemptions May Not Be Side-Stepped by Artful Pleading

The issue of side-stepping exemptions via the use of artful pleading has not been addressed by the Mississippi Supreme Court, but has been addressed by numerous federal courts vis-a-vis the Federal Tort Claims Act exemption statute.[174] The issue concerns a plaintiff's attempt to get around an exemption by pleading a tort that is not barred by any exemption. For example, where an injury to a hospital visitor occurs because a state hospital lacked the resources to hire a guard on the floor where dangerous patients were housed, an omission which could be immunized by Mississippi's exemption subsection (r), and the visitor/claimant alleges that the hospital was negligent in failing to exercise due care toward visitors, would the plaintiff's pleading take the case outside the immunizing effects of exemption (r)?[175]

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[171] *Id.* at 568-69 (citing OKLA. STAT. ANN. tit. 51, §§ 155(7), (13), (24), (26), 158(B) (West Supp. 1999)).

[172] *Id.* at 569.

[173] MISS. CODE ANN. § 11-46-17(4).

[174] 28 U.S.C. § 2680 (1994) (containing fourteen exemptions). This statute has in common with Mississippi's exemptions an avoidance of governmental liability for claims based upon the execution of a statute, a discretionary act, an assessment or collection of taxes, and an imposition of a quarantine.

The federal courts have considered this question with regard to an intentional tort exemption not contained in our act, but which may nevertheless serve as a useful guide for judicial interpretation of the scope of our exemptions. In *Coffey v. United States*,[176] the court ruled that a plaintiff could not overcome the government's exemption for claims arising out of an assault by pleading an allegation of negligent discharge of a firearm by a Marine guard.[177] The court reasoned that "a plaintiff cannot overcome the [exemption] merely by the artistry of his pleading. 'It is, of course, the substance of the claim, and not the language used in stating it, that controls.'"[178] In explaining the scope of the exemption, the court stated "[t]he test is not the theory upon which the plaintiff elects to proceed or how artfully the pleadings have been drawn. Rather, the decisive factor is whether, in substance and essence, the claim arises out of an assault and battery."[179] The court also dismissed the plaintiff's claim that he may have been injured as a result of the negligent firing of a warning shot, reasoning that even if that were the case, under common law, the guard could have been held liable for assault for firing the gun and that this was precisely the type of action the exemption had been created to bar.[180]

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[175] MISS. CODE ANN. § 11-46-9(r) (Supp. 1998).

[176] 387 F. Supp. 539 (D. Conn. 1975).

[177] *Coffey*, 387 F. Supp. at 540 (discussing 28 U.S.C. § 2680(h)).

[178] *Id.*

[179] *Id.* (citing Nichols v. United States, 236 F. Supp. 260, 263 (N.D. Miss. 1964)).

[180] *Id.; see* Vaughn v. United States, 259 F. Supp. 286, 289 (N.D. Miss. 1966)

Clearly, where an exemption bars recovery for a particular immunized act even though the facts of the case may also allow for an allegation of another tort arising out of the same act, the applicable exemption will nevertheless bar any claim for the tortious act, notwithstanding a plaintiff's attorney's artful pleading skills.

2. Specific Cases Pertaining to Exemptions

Section 11-46-9 of the Mississippi Code provides for the "[e]xemption of governmental entit[ies] from liability on claims based on specified circumstances."[181] According to subsection (1), "[a public] entity and its employees acting within the course and scope of their employment or duties shall not be held liable for any claim" that has a factual basis pertaining to any one or more of twenty-four enumerated exemptions.[182] Each of these exemptions will be analyzed in light of relevant Mississippi, sister state, and federal case law interpreting these or similarly worded exemptions, in an attempt to determine their application and scope.

(a) Arising out of a Legislative or Judicial Action or Inaction, or Administrative Action or Inaction of a Legislative or Judicial Nature

(i) Legislative Acts

When the Legislature passed the Governmental Immunity Act, it preserved several long held common law immunities, including that of legislative immunity.[183] In *State v. Hinds County Board of Supervisors*,[184] the Mississippi Supreme Court ruled that the legislative exemption immunized the State from an action for damages in which the plaintiff asserted the

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(holding that exemption barring claims arising out of any tortious misrepresentation barred negligence action for faulty plan devisement).

[181] MISS. CODE ANN. § 11-46-9 (Supp. 1998).

[182] MISS. CODE ANN. § 11-46-9(1)(a-x).

[183] MISS. CODE ANN. § 11-46-9(1)(a).

[184] 635 So. 2d 839 (Miss. 1994).

unconstitutionality of a state statute.[185] In so ruling, the court cited the legislative exemption, declaring that "this statute prevents [the plaintiff] from recovering from the State" for the legislators' passage of any laws.[186]

Although the Mississippi Supreme Court has yet to revisit this exemption since the *Hinds* decision, there exists a wealth of common law which fully sets out the exemption's application and scope. One such case is *Dunmore v. City of Natchez*,[187] where a plaintiff sued various municipal officials for violation of her civil rights by denying her application for a zoning ordinance.[188] Addressing the scope of common law legislative immunity, the court stated, "Individuals who serve as local legislators are absolutely immune from civil liability for actions in furtherance of their official duties. In determining the scope of this immunity, we look both to the type of official and to the type of act for which immunity is claimed."[189]

The *Dunmore* court found that the enactment or denial of a zoning ordinance by a city council was a legislative act, as were the zoning recommendations made by a city-appointed zoning board.[190] However, the court added that "[a]bsolute immunity does not mean immunity from all conduct by virtue of office,"[191] and ruled that acts not involving votes cast in an official capacity as a legislator, such as a mayor's threat of enforcement of a zoning ordinance, as opposed to a mayor's veto of a zoning ordinance, do not fall within the ambit of legislative immunity.[192]

It is the nature of the act that is crucial to the determination of liability. Accordingly, even where the state or local legislator's vote is cast with malice or with other dubious motives, absolute immunity nevertheless applies to bar any action for damages against the public entity or individual official.[193] Just as legislative immunity bars actions against legislative officials for adopting or failing to adopt enactments, so too does it bar actions against legislative officials, such as legislators, supervisors, city council members, and even mayors[194] or governors,[195] for vetoing or approving enactments, ordinances, and statutes.

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[185] *Hinds County Bd. of Supervisors*, 635 So. 2d at 842.

[186] *Id.*

[187] 703 F. Supp. 31 (S.D. Miss. 1988).

[188] *Dunmore*, 703 F. Supp. at 32.

[189] *Id.* (citations omitted).

[190] *Id.*

[191] *Id.*

[192] *Id.* at 33.

(ii) Judicial Acts

As with legislative immunity, judicial immunity has been around for a long time, and the legal theory justifying it may also be found in the common law. No better expression of that theory may be found than that offered by the Fifth Circuit Court of Appeals in *Mays v. Sudderth*,[196] where the court stated:

> It is well established that judges enjoy absolute immunity for judicial acts performed in judicial proceedings. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." This broad scope of immunity is afforded to judges . . . because their role in the judicial system requires that they enjoy freedom to determine the law unfettered by the threat of collateral at-

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[193] *See* Timber Properties, Inc. v. Township of Charter, 500 A.2d 757, 764-66 (N.J. Super. Ct. Law Div. 1984) (holding that action for damages was barred by absolute immunity even if legislator's vote was cast with actual malice); *see also* McCracken v. City of Lawton, 648 P.2d 18, 20 (Okla. 1982) (holding that exemption barred action for attorneys' fees because it forced court to consider "the essential character of the governmental action for which liability is sought to be imposed rather than . . . the particular form of action, in the context of which the issue is tendered").

[194] *See Timber Properties, Inc.*, 500 A.2d at 763-66 (holding that legislative immunity extended to municipal legislators); Tutwiler Drug Co. v. City of Birmingham, 418 So. 2d 102, 102 (Ala. 1982) (holding that absolute immunity barred claim of negligence and abuse of direction against mayor in exercise of mayor's legislative functions).

[195] *See* Mandel v. O'Hara, 576 A.2d 766, 766 (Md. 1990) (holding that legislative exemption covers governor's veto of legislative act).

[196] 97 F.3d 107 (5th Cir. 1996).

> tacks against the judge personally. . . . Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation.[197]

In other words, the court's subject matter jurisdiction is the focal point of our inquiry. If a chancery judge with jurisdiction only in divorce and custody cases tried a criminal case, he would be acting outside his jurisdiction and would not be protected by absolute judicial immunity. However, should a municipal judge convict a defendant of a non-existent crime, he would be absolutely immune.

A second exception to absolute judicial immunity concerns a judge's performance of an act that is not judicial in nature.[198] The factors relevant to this determination have been held to be (1) whether the act is normally performed by a judge, and (2) whether the parties had an expectation of dealing with the judge in his or her judicial capacity.[199] For example, a judge is not ordinarily expected to engage in fisticuffs, and if one does so, even when wearing the black robes, he is not performing a judicial function.

The third and final exception to absolute judicial immunity involves actions seeking prospective or injunctive relief against individual judges.[200] Judges may not defend against such actions by claiming absolute judicial immunity.[201]

Utilizing the above-cited standards, the courts have applied absolute judicial immunity to bar various types of claims, including an action against an administrative law judge for presiding over a case in which he had political interest, for not assigning the case to another judge,[202] as well as a suit against a family court judge for assigning a particular judge to a case and appointing certain members to a Child Placement Review Board.[203] This exemption only applies to judges, however, as judicial immunity has not been extended to prison disciplinary hearing officers.[204]

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[197] *Mays*, 97 F.3d at 110-11 (citations omitted). *See* Pierson v. Ray, 386 U.S. 547, 553 (1967) (holding that judge is immune from damages for unconstitutional conviction), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[198] Layne v. Hyde, 773 P.2d 83, 87 (Wash. Ct. App. 1989).

[199] *See, e.g., Layne*, 773 P.2d at 87 (holding that exemption applied to administrative law judge's alleged improper denial of continuance); O'Laughlin v. Windham, 498 S.E.2d 689, 692 (S.C. Ct. App. 1998) (holding that judge was immunized by exemption for possibly malicious threat to issue warrant).

[200] *O'Laughlin*, 498 S.E.2d at 692.

[201] *Id.* at 692, 694 (holding that South Carolina Tort Claims Act did not "supplant common law judicial immunity").

Even so, another aspect of this exemption does apply to non-judges, namely the doctrine of quasi-judicial immunity.[205] This doctrine has been defined as "the rule of public policy which protects judicial officers and those exercising judicial functions . . . from liability in actions of tort for wrongs committed by them when acting in that capacity."[206] The rationale for this policy is that when a quasi-judicial officer or board is called upon to pass upon evidence and make rulings, they should not be called upon to answer in damages for their decisions.[207]

This doctrine has been applied to various quasi-judicial officers acting in quasi-judicial capacities, including prosecutors,[208] parole board members,[209] probation officers performing at the discretion of a judge,[210] state and local prosecutors instituting and prosecuting cases,[211] administrative hearing officers,[212] school trustees,[213] assistant U.S. Attorneys,[214] public defenders,[215] attorneys general and their assistants and deputies,[216] peace officers within the bounds of their authority,[217] boards of medical and psychological examiners[218] or evaluators,[219] state adoption review boards,[220] social workers and other county adoption officials,[221] sheriffs,[222] witnesses testifying before an administrative agency,[223] and a Board of Psychologists investigating complaints against a psychiatrist.[224] All such public officials acting in a quasi-judicial capacity have been held absolutely immune from tort suits by virtue of an exemption subsection similar to Mississippi's subsection (a) or because of common law precedent.

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[202] *Layne*, 773 P.2d at 87.

[203] *See* Delbridge v. Schaeffer, 569 A.2d 872, 879-80 (N.J. Super. Ct. Law Div. 1989) (holding that judge did not lose his immunity by discussing case with media after plaintiff had already done so).

[204] *See* Tulloch v. Coughlin, 50 F.3d 114, 116 (2d Cir. 1995). (stating that "courts have rejected the contention that these officials should have absolute immunity but rather have afforded them qualified immunity").

[205] *See* Shargal v. State Bd. of Exam'rs of Psychologists, 604 A.2d 559, 561-62 (N.H. 1992) (holding Board's investigation of psychiatrist fell under quasi-judicial immunity).

[206] *Shargal*, 604 A.2d at 561.

[207] *See* Imbler v. Pachtman, 424 U.S. 409, 424-31 (1976) (affirming prosecutor's common law absolute prosecutorial immunity).

[208] *Imbler*, 424 U.S. at 424-31. *See* Metro Charities, Inc. v. Moore, 748 F. Supp. 1156, 1163 (S.D. Miss. 1990) (recognizing absolute prosecutorial immunity for state prosecutor's exercise of quasi-judicial power).

[209] Silver v. Dickson, 403 F.2d 642, 643-44 (9th Cir. 1968). *See* Tarter v. State, 503 N.E.2d 84, 85 (N.Y. 1986).

[210] *See* Hulsman v. Hemmeter Dev. Corp., 647 P.2d 713, 718 (Haw. 1982) (holding that probation officers are entitled to absolute immunity offered to judges whom they serve).

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[211] *See* Cappuccio, Inc. v. Harmon, 257 Cal. Rptr. 4, 8 (Cal. Dist. Ct. App. 1989) (holding investigator for Fish and Game Commission immune from suit for statements made after judicial proceeding). *But see* Johnson v. City of Meridian, 23 F. Supp. 2d 681, 684 (S.D. Miss. 1998) (holding that prosecutor loses absolute immunity when engaging in investigatory acts, such as advising officer when to make arrest, and loses qualified immunity if no probable cause exists for arrest).

[212] Loran v. Iszler, 373 N.W.2d 870, 876-77 (N.D. 1985).

[213] Baker v. Story, 621 S.W.2d 639, 646 (Tex. Civ. App. 1981).

[214] Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971).

[215] Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972).

[216] Metro Charities, Inc. v. Moore, 748 F. Supp. 1156, 1163-64 (S.D. Miss. 1990). *See* Delbridge v. Schaeffer, 569 A.2d 872, 881-82 (N.J. Super. Ct. Law Div. 1989), *aff'd by* A.D. v. Franco, 687 A.2d 748 (N.J. Super. Ct. App. Div. 1993).

[217] Yeager v. Hurt, 433 So. 2d 1176, 1179 (Ala. 1983).

[218] *See* Koppen v. Board of Med. Exam'rs, 759 P.2d 173, 176 (Mont. 1988) (holding Board immune for negligent failure to revoke doctor's license.).

[219] *See* Christensen v. State, 464 S.E.2d 14, 17-18 (Ga. Ct. App. 1995) (holding Georgia Mental Health Institute immune under assault and battery and discretionary functions exception when it denied convicted rapist of emergency psychiatric treatment).

[220] *See Delbridge*, 569 A.2d at 884-87 (holding decision to place child in home to be absolutely immune).

[221] Ronald S. v. County of San Diego, 20 Cal. Rptr. 2d 418, 423-26 (Cal. Ct. App. 1993).

[222] Mays v. Sudderth, 97 F.3d 107, 113 (5th Cir. 1996).

[223] *See* Overman v. Klein, 654 P.2d 888, 894 (Idaho 1982) (holding witness's libelous statement in affidavit, which was relevant to temporary hearing inquiry, protected by quasi-judicial absolute immunity).

[224] Shargal v. State Bd. of Exam'rs of Psychologists, 604 A.2d 559, 561 (N.H. 1992).

(iii) Administrative Acts

Quasi-judicial immunity is very similar to immunity for administrative acts of a legislative or judicial nature. As with quasi-judicial absolute immunity, where an administrative agency or employee acts in accordance with a quasi-judicial or legislative purpose, that act will not subject the agency or employee to tort liability even though the action is proved to be in error or to be the consummation of dubious intentions.

For example, where a plaintiff alleged that a state agency filed a paternity and child support recovery action solely for the purpose of harassing him and violating his privacy, the Georgia Court of Appeals, in *Department of Human Resources v. Money*,[225] ruled that the administrative exemption of the Georgia Tort Claims Act barred his action against all administrative officials involved even though the plaintiff successfully defeated the custody action and proved that he was not the father of the child in question.[226]

In an unpublished opinion of no precedential value, the Mississippi Supreme Court ruled that "[p]ersonnel disciplinary matters and the administrative hearings and proceedings which follow are clearly administrative actions of a judicial nature."[227] In so ruling, the court decided that the plaintiff's employers' allegedly slanderous comments during disciplinary and administrative hearings did not subject the State to liability because of the immunizing effect of exemption subsection (a). If this case is truly indicative of the court's future reasoning in these matters, then we can expect the court to apply subsection (a) with broad, immunizing strokes.

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[225] 473 S.E.2d 200 (Ga. Ct. App. 1996).

[226] *Money*, 473 S.E.2d at 201. In *Money*, the court held that the sovereign immunity doctrine requires strict adherence to conditions and limitations included in the waiver. *Id.*

[227] Mississippi Dep't of Pub. Safety v. Aubuchon, No. 94-CA-01219-SCT, slip op. at 12 (Miss. Mar. 13, 1997). *See Overman*, 654 P.2d at 892.

(b) Arising out of Any Act or Omission of an Employee of a Governmental Entity Exercising Ordinary Care in Reliance Upon, or in the Execution or Performance of, or in the Failure to Execute or Perform, a Statute, Ordinance or Regulation, Whether or Not the Statute, Ordinance or Regulation is Valid

Subsection (b) pertains to any acts arising from the execution or performance of a statute, ordinance or regulation, whereas subsection (e), discussed *infra*, concerns the negligent adoption or failure to adopt any statute, ordinance, or regulation.[228] Therefore, once any such law or regulation is passed, regardless of whether or not it is valid, any negligent act or omission in enforcing or failing to enforce such law or regulation may be immunized by subsection (b).

Although the theory of protecting the government from liability for failing to do all that it should has its basis in common law,[229] most states, including South Carolina, have adopted exemptions immunizing themselves for their execution or non-execution of laws or regulations.[230] Subsection (b) of Mississippi's Act is based directly upon and is a mirror image of a previously promulgated South Carolina statute.[231] Thus, it may be assumed that our Legislature intended to adopt the rules of law that the South Carolina courts promulgated regarding that exemption.

Strictly enforcing its version of this exemption, the South Carolina Supreme Court held that although a municipality's failure to enforce a leash law resulted in runaway dogs chasing a child into traffic with fatal consequences, the municipality could not be held liable for that child's death because the City's failure to enforce a local animal control ordinance ultimately caused the tragic event.[232] The court rejected the plaintiff's argument that his action was based upon the County's failure to respond to various citizens' complaints about runaway vicious dogs, stating that "the gravamen of the complaint [was] the County's failure to enforce the ordinance. Thus, the acts which [were] alleged in the complaint [were] completely intertwined in the enforcement or non-enforcement of the ordinance."[233]

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[228] MISS. CODE ANN. § 11-46-9(b), (e) (Supp. 1998).

[229] *See, e.g.*, Grogan v. Commonwealth, 577 S.W.2d 4, 5 (Ky. 1979) (comparing municipal liability with individual and corporate liability).

[230] *See* S.C. CODE ANN. § 15-78-60(4) (Supp. 1998).

[231] S.C. CODE ANN. § 15-78-60(4).

[232] Adkins v. Varn, 439 S.E.2d 822, 824 (S.C. 1993).

Although the *Adkins* decision appears at first blush to create a wide scope for this exemption, there are several other key issues relevant to its application, including the meaning of "ordinary care," the "validity" of the statute, or the scope of the law or regulation concerned, and whether or not the act complained of constitutes a separate tort under common law. Our courts have yet to provide a definition of "ordinary care" in the context of this exemption, but many federal courts have so provided in the context of the Federal Tort Claims Act.[234] Those cases have defined "due care," which is synonymous with "ordinary care,"[235] as showing a minimal concern for the rights of others.[236] The government must demonstrate due care to claim immunity under this exemption. An entity may not fail to enforce a statute where that failure indicates no minimal concern for the rights of others. As to what constitutes this due or ordinary care, the federal courts have ruled, for instance, that making a seizure of a vehicle without a warrant did not constitute due care,[237] and neither did seizing and destroying horses without giving the prior notice mandated by a federal statute.[238]

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[233] *Adkins*, 439 S.E.2d at 824-25.

[234] 28 U.S.C. § 2680(a) (1994). The statute provides that the United States is immune from "[a]ny claim based upon an act or omission of an employee . . . exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . . ." 28 U.S.C. § 2680(a).

[235] Magnolia Constr. Co. v. Mississippi Gulf South Eng'rs, Inc., 518 So. 2d 1194, 1202 (Miss. 1988). *See* Consumers Credit Corp. v. Stanford, 194 So. 2d 868, 871-73 (Miss. 1967) (holding "ordinary care" is synonymous with "due care"); *see also* L.W. v. McComb Separate Mun. Sch. Dist., 97-CA-01465-SCT (Miss. March 31, 1999) (holding that determination of "ordinary care" is question of fact to be decided by trial judge).

[236] See *Hatahley v. United States*, 351 U.S. 173, 181 (1956), a case in which the government seized Native-Americans' horses without giving the notice required by the Federal Range Code.

[237] *See* De Bonis v. United States, 103 F. Supp. 123, 125 (W.D. Pa. 1952)

The phrase "validity of a law or regulation" has been interpreted to mean that the exemption not only shields public entities from liability where their agents execute an invalid statute or by ordinance, but it also prevents the challenge of a statute's validity by any tort claims act inquiry into the validity of any such law or by regulation. In *Willis v. United States*,[239] the court declared that "the primary purpose of the [execution of a statute exemption] was to preclude testing the legality of a statute or regulation by a tort action."[240]

Although this exemption prevents the challenge of a statute's validity, the scope of this exemption is still a key issue because when the allegedly tortious conduct falls outside the intended scope of the legislation or regulation, that conduct will not be immunized. For example, in *Womack v. City of Oklahoma City*,[241] the court rejected the City's argument that it was immune for its negligent enforcement of an ordinance which allowed it to impound a citizen's vehicle.[242] The court noted that although the City was within its rights to impound the vehicle, its requirement that the owner sign a hold-harmless document in order to obtain release of the vehicle was a "condition not warranted by the pertinent ordinance."[243] The court concluded that since the statute did not allow the government to make this requirement, the government's actions were beyond the statute's scope and accordingly, not immunized by the

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(describing government's act as "brazen and unwarranted").

[238] *Hatahley*, 351 U.S. at 181.

[239] 600 F. Supp. 1407 (N.D. Ill. 1985).

[240] *Willis*, 600 F. Supp. at 1414 (quoting Stewart v. United States, 486 F. Supp. 178, 181 (C.D. Ill. 1980)). The court concluded that the exemption applied where the gravamen of the complaint was the unconstitutionality of the statute, as opposed to the government's overt act. *Id.* at 1414. In *Willis*, the plaintiff sought for the court to declare a statute unconstitutional and to award damages, which the court held to be barred by the enforcement exemption of the Federal Tort Claims Act. *Id.* at 1411, 1415.

[241] 726 P.2d 1178 (Okla. 1986).

[242] *Womack*, 726 P.2d at 1181.

[243] *Id.* (emphasis omitted).

statutory execution exemption.[244]

Furthermore, this exemption does not immunize a governmental entity when the offending act in question constitutes a specific tort at common law and the act is more closely related to the tort than to the entity's failure to enforce a regulation. In *Jackson v. City of Kansas City*,[245] the court held that the City could not hide behind this exemption with its claim that it was immunized from liability for its employee's failure to abide by a departmental regulation concerning the operation of emergency vehicles.[246] In *Jackson*, the operation of an emergency vehicle resulted in an automobile accident.[247] The negligent act of driving constituted a tort at common law and was the immediate source of the plaintiff's harm, not the agency's failure to abide by a regulation.[248]

However, the exemption applies where an act, which was not a common law tort, directly causes the harm. For example, where a plaintiff sued a city for failure to enforce the fortune-teller's licensing laws, a Kansas court found that the City's failure to deny a license was not a common law tort and that its issuance of the license fell within the purview of the licensing ordinance.[249]

The fact that an act or omission may conceivably be found to be both within and without the purview of a law or ordinance, and hence both barred and not barred by this exemption, sometimes hampers this analysis. In *Smith v. Oral Roberts University*,[250] a widow brought a wrongful death action against a municipality after her husband was killed as a result of the City's failure to remove or require the removal of vegetation located on private property that was obstructing the view of drivers approaching the intersection at which the fatal accident occurred.[251] The City raised as its defense the exemption of the Oklahoma Governmental Tort Claims Act which provided that "a political subdivision shall not be liable if a loss or claim results from . . . enforcement of or failure to enforce a law, whether valid or invalid, including but not limited to, any . . . charter provision, ordinance . . . regulation or written policy."[252] The court held that the allegation of a failure to *require removal* of vegetation as per the mandates of a local nuisance ordinance must be dismissed because the City was "without liability as regards . . . enforcement or failure [of enforcement] of its ordinance."[253] However, as to the allegation concerning failure to *remove* the offending vegetation, the court denied the City's motion to dismiss for failure to state a claim, "insofar as it alleges liability for the negligent maintenance of a dangerous condition on the part of the City on land possessed . . . by the City."[254]

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[244] *Id.*

[245] 680 P.2d 877 (Kan. 1984).

[246] *Jackson*, 680 P.2d at 885-86 (placing burden on government to establish that its action came within exemption's protections).

[247] *Id.* at 882.

[248] *Id.* at 885-86.

[249] *See* Barber v. Williams, 767 P.2d 1284, 1288 (Kan. 1989) (holding that city's investigation of fortune teller was made in accordance with applicable statute's requirements).

[250] 732 P.2d 450 (Okla. 1986).

The *Smith* decision accentuates the importance of a plaintiff's pleading choices in the face of a potential tort claims act exemption defense. Just as attorneys defending public entities should be careful to raise any and all exemptions that may apply to the facts of their case, plaintiffs' attorneys suing public entities must anticipate the potential exemption defenses and allege all factually appropriate causes of action in order to insure that a client's legitimate claims are not defeated by a failure to plead facts which would defeat the application of the exemption.[255]

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[251] *Smith*, 732 P.2d at 451.

[252] *Id.* (quoting OKLA. STAT. ANN. tit. 5, § 155(4) (Supp. 1999)).

[253] *Id.*

[254] *Id.* at 452. In other words, the exemption protected the City's failure to require removal of vegetation, but not its failure to remove the vegetation. *Id.*

[255] The *Smith* caveat that a plaintiff should allege all possible causes of action to be sure that his action is not defeated by an inapplicable exemption, may be distinguished from the *Nichols* caveat that artful pleading will not overcome an applicable exemption. *Id.* at 451-52. *See* Nichols v. United States, 236 F. Supp. 260, 263 (N.D. Miss. 1964). In *Smith,* the allegedly negligent act fell outside the scope of the regulation enforcement exemption, while the *Nichols* act fell within the federal assault exemption's scope. *See Nichols*, 236 F. Supp. at 263; *Smith,*

(c) Arising out of Any Act or Omission of an Employee of a Governmental Entity Engaged in the Performance or Execution of Duties or Activities Relating to Police or Fire Protection Unless the Employee Acted in Reckless Disregard of the Safety and Well-being of Any Person Not Engaged in Criminal Activity at the Time of Injury

The police protection exemption has been closely scrutinized by Mississippi's highest court, as well as by Mississippi's federal district courts. The following is an analysis of those decisions, divided into sections specifically pertaining to and defining the three key phrases in the exemption, "police and fire protection," "reckless disregard," and "criminal offense."

(i) What Are Police and Fire Protection?

Without offering precise definitions, Mississippi's courts have determined that certain acts constitute "police protection," including deciding whether to arrest a driver or allow him to continue driving,[256] arresting and detaining a suspect,[257] administering an intoxilizer test on the roadway,[258] accidentally shooting a person resisting arrest,[259] hiring and training police,[260] and aiming weapons at and negligently detaining a suspect.[261] Mississippi courts have yet to define "fire protec-

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732 P.2d at 452-52.

[256] *See* Turner v. City of Ruleville, No. 95-CA-00880-SCT, 1997 WL 562151, at *5 (Miss. Sept. 11, 1997) (holding officer immune without showing of reckless disregard for safety and well-being).

[257] *See* Foster v. Noel, 715 So. 2d 174, 178-80 (Miss. 1998) (holding that officer was not liable under Mississippi Tort Claims Act where he acted pursuant to valid arrest warrant and not in reckless disregard for arrestee's safety and well-being).

[258] *See* Hall v. Mississippi Dep't of Pub. Safety, No. 96-CA-00832-SCT, slip op. at 7 (Miss. 1998) (involving situation where officer placed driver in harm's way while administering roadside sobriety tests).

[259] *See* Moore v. Carroll County, 960 F. Supp. 1084, 1088-92 (N.D. Miss. 1997) (holding deputy immune from state tort claim arising when deputy's weapon accidentally discharged).

[260] *Moore*, 960 F. Supp. at 1093-94 (stating training and supervision of police personnel fell within discretionary function exemption of Mississippi Tort Claims Act).

[261] *See* Smith v. Thompson, 2:96CV159-B-B, 1998 WL 97287, at *2-3 (N.D.

tion" in the Immunity Act context.

However, other courts have ventured to establish such a definition in the tort claims act context. Texas courts have defined "police protection" as "the prevention of crime and the apprehension, punishment and rehabilitation of criminals."[262] Pursuant to this or similar definitions, other state courts have found the following acts to constitute "police protection," and hence, immunized by a "police protection" exemption: transporting and placing a person in protective custody,[263] carrying out a D.U.I. arrest,[264] responding to an emergency,[265] failing to respond to an emergency call within forty-five minutes,[266] failing to timely disarm and restrain a psychotic inmate,[267] searching for a missing person,[268] supplying street lights,[269] supplying crossing guard service,[270] controlling crowds during a city celebration[271] or fireworks display,[272] failing to prevent an inmate's suicide,[273] making various policy and budget-

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Miss. Jan. 28, 1998) (granting summary judgment in favor of officer where police aimed weapon at person mistakenly believed to be real suspect).

[262] *See* Alvarado v. City of Brownsville, 865 S.W.2d 148, 157 (Tex. App. 1993) (holding for exemption to apply, activity must be integral part of police protection, and not simply incidental thereto), *rev'd on other grounds sub nom.* City of Brownsville v. Alvarado, 897 S.W.2d 750 (Tex. 1995).

[263] Schmidt v. Grady County, 943 P.2d 595, 597 (Okla. 1997).

[264] Lloyd v. University of Texas, 524 S.W.2d 958, 958-59 (Tex. Civ. App. 1975).

[265] *See* Langley v. City of Amarillo, 579 S.W.2d 351, 352 (Tex. Civ. App 1979) (discussing section of Texas Tort Claim Act that provides immunity where police officers are "responding to emergency calls or reacting to emergency situation").

[266] *See* Hartzler v. City of San Jose, 120 Cal. Rptr. 5, 7 (Cal. Dist. Ct. App. 1975) (holding police protection immunity to be absolute).

[267] *See* Beck v. Calvillo, 671 F. Supp. 1555, 1562-63 (D. Kan. 1987) (holding administrator not liable for inmate's shooting of hospital visitor on grounds that his efforts to find hidden weapons constituted police protection).

[268] Platacis v. Village of Streamwood, 586 N.E.2d 564 (Ill. App. Ct. 1991).

[269] *See* Burley v. On The Waterfront, Inc., 592 N.E.2d 623, 628 (Ill. App. Ct. 1992) (holding governmental entity immune from liability "due to failure to provide adequate or effective lighting" where plaintiff was attacked by third party while walking to festival).

[270] Goebig v. City of Chicago, 544 N.E.2d 1114, 1115 (Ill. App. Ct. 1989).

[271] Dockery v. Village of Steeleville, 558 N.E.2d 449, 450-51 (Ill. App. Ct. 1990).

[272] Cadena v. Chicago Fireworks Mfg. Co., 697 N.E.2d 802, 809 (Ill. App. Ct. 1998).

[273] Davis v. County of Lubbock, 486 S.W.2d 109, 110 (Tex. Civ. App. 1972).

ary decisions,[274] setting maximum speed limits and detecting violators with radar,[275] and failing to provide adequate security at fairgrounds[276] or sports arenas.[277]

Acts which have been found to not be covered by the police protection exemption include: failing to dispatch officers to an area where cattle were reported loose,[278] driving negligently in a non-emergency situation,[279] deciding the type of mattresses to be used in a prison cell,[280] pulling into traffic to catch a speeder,[281] failing to prevent an inmate's suicide,[282] accidentally shooting a fellow officer after an arrest of a felon had already been consummated,[283] failing to notify residents of the escape of a dangerous inmate,[284] and failing to prevent one inmate from assaulting another.[285]

It has also been held that the "police protection" exemption does not immunize the government when a special relationship exists between the police and a citizen.[286] This situation arises when the citizen relies upon the express or implied promise of protection made by a department or officer.[287] Although there may be no original liability under the circumstances, where an entity undertakes action on behalf of a citizen, thereby inducing that individual's reliance on protection, then the officer or department is held to the same standard as a private person or organization.[288] However, some courts have held that the police or fire protection exemption abrogated the common law special relationship doctrine.[289]

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[274] Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688, 696 (Cal. Dist. Ct. App. 1988).

[275] *See* State v. Terrell, 588 S.W.2d 784, 788 (Tex. 1979) (holding officers liable for negligently pulling into traffic in pursuit of speeders).

[276] Stone v. State, 165 Cal. Rptr. 339, 342 (Cal. Dist. Ct. App. 1980).

[277] *See* Rodriguez v. New Jersey Sports & Exposition Auth., 472 A.2d 146, 148 (N.J. Super. Ct. App. Div. 1983) (holding failure to supply security at state racetrack immunized).

[278] Eames v. Board of County Comm'rs, 733 F. Supp. 322, 324-25 (D. Kan. 1990).

[279] *See* Langley v. City of Amarillo, 579 S.W.2d 351, 353 (Tex. Civ. App. 1979) (holding that only driving during emergencies falls within ambit of exemption).

[280] Forbus v. City of Denton, 595 S.W.2d 621, 622 (Tex. Civ. App. 1980).

[281] State v. Terrell, 588 S.W.2d 784, 788 (Tex. 1979).

[282] Alvarado v. City of Brownsville, 865 S.W.2d 148, 159 (Tex. App. 1993), *rev'd on other grounds sub nom.* City of Brownsville v. Alvarado, 897 S.W.2d 750 (Tex. 1995).

[283] *See* Beckley v. Crabtree, 428 S.E.2d 317, 320 (W. Va. 1993) (imposing liability where officer's shotgun accidently discharged while placing in trunk).

[284] Cansler v. State, 675 P.2d 57, 70-71 (Kan. 1984).

[285] *See* Washington v. State, 839 P.2d 555, 559 (Kan. Ct. App. 1992) (holding prior knowledge of threats against inmate created duty to prevent rape which exemption did not obviate); City of Waco v. Hester, 805 S.W.2d 807, 813 (Tex. App. 1990) (holding police protection exemption immunizes negligent formulation of policy to prevent inmate rape and not negligent implementation of policy).

[286] *See* Joseph T. Bockrath, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection*, 46 A.L.R. 3d 1084, 1091-

"Fire protection" has been subject to even less frequent and precise definition than "police protection," but has nevertheless been held to include: deciding to provide only three fire trucks to a community,[290] failing to maintain fire hydrants or warn of their defective state,[291] maintaining fire hydrants and the city water supply,[292] failing to provide sufficient water pressure,[293] failing to provide sufficient facilities to suppress a fire,[294] failing to prevent injury from a high velocity stream from a hydrant opened by an unauthorized person,[295] placing hydrants and number of fire trucks,[296] negligently failing to supply sufficient water sprinkler systems,[297] a city's fire hydrant inspection policy,[298] and failing to have a properly equipped fire truck and a properly trained fire crew.[299]

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94 (1972).

[287] Stone v. State, 165 Cal. Rptr. 339, 342 (Cal. Dist. Ct. App. 1980).

[288] *Id.*

[289] Harinek v. 161 North Clark St. Ltd. Partnership, 692 N.E.2d 1177, 1184 (Ill. 1998).

[290] State v. Terrell, 588 S.W.2d 784, at 788 (Tex. 1979).

[291] Shockey v. City of Oklahoma City, 632 P.2d 406, 408 (Okla. 1981).

[292] *See* Wells v. City of Lynchburg, 501 S.E.2d 746, 750-51 (S.C. Ct. App. 1998) (holding failure to inspect hydrants for adequate water pressure immunized).

[293] Pierce v. Village of Divernon, 17 F.3d 1074, 1077-78 (7th Cir. 1994).

[294] Lanier Invs. v. Department of Water & Power, 215 Cal. Rptr. 812 (Cal. Dist. Ct. App. 1985).

[295] Williams v. City of New Haven, 707 A.2d 1251, 1251 (Conn. 1998).

[296] Jackson v. City of Kansas City, 680 P.2d 877, 890 (Kan. 1984), *superseded by statute as stated in* Jarbue v. Board of County Comm'rs, 938 P.2d 1293 (Kan. 1997).

[297] Gans Tire Sales Co. v. City of Chelsea, 450 N.E.2d 668, 669 (Mass. App. Ct. 1983).

[298] Ross v. City of Houston, 807 S.W.2d 336, 337 (Tex. App. 1990).

[299] *See* Hyde v. Evergreen Volunteer Rural Fire Dep't, 828 P.2d 1377, 1380

In *City of Columbus v. McIlwain*,[300] the Mississippi Supreme Court ruled a municipality immune for the destruction of property due to fire caused by negligence in permitting a fire hydrant to become defective.[301] Although that case was decided in 1949, years before the Governmental Immunity Act was passed in 1993, the court's common law reasoning is consistent with sister state tort claims act cases interpreting similarly worded "fire protection" exemptions, and should have full application to Mississippi's new "fire protection" exemption.

(ii) What Is Reckless Disregard?

In *Turner v. City of Ruleville*,[302] the Mississippi Supreme Court decided that the "reckless abuse" with which a police or fire officer must act to fall outside the shield of immunization offered by the police and fire protection exemption, is that which constitutes an intentional act.[303] In *Turner*, an officer negligently allowed a drunk driver to continue driving his own vehicle, whereupon the driver injured his own passenger, the plaintiff, in a subsequent automobile accident.[304] The court rejected the plaintiff's argument that "reckless disregard" meant merely "gross negligence," and declared that "[o]ur case law indicates 'reckless disregard' embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act."[305] However, on rehearing, the court concluded that the officer's failure to arrest the obviously drunk driver constituted "reckless disregard" for the public's safety, and ruled that the exemption did not apply to immunize the

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(Mont. 1992) (holding that Montana's fire protection exemption also applies to volunteer fire departments); Eger v. Lynch, 714 A.2d 1149, 1152 (Pa. Commw. Ct. 1998) (stating volunteer fire department covered by Tort Claims Act fire protection exemption).

[300] 38 So. 2d 921 (Miss. 1949).

[301] *McIlwain*, 38 So. 2d at 922-23.

[302] No. 95-CA-00880-SCT, 1997 WL 562151, at *1 (Miss. Sept. 11, 1997), *rev'd en banc* (Miss. Mar. 25, 1999).

[303] *Turner*, 1997 WL 562151, at *3-5.

[304] *Id.* at *1.

[305] *Id.* at *4-5.

City.[306]

In *Smith v. Thompson*,[307] Mississippi's Northern District Court examined a situation wherein police officers, following a tip that a murder suspect was hiding in a woman's apartment, held the woman at gunpoint while they searched her apartment without a warrant.[308] The matter was further complicated by the fact that the Sherri Smith they detained was not the Sherri F. Smith that was actually harboring a suspect.[309] The court found that notwithstanding the case of mistaken identity, the officers did not act "in reckless disregard of the safety and well-being of the plaintiff."[310]

In *Foster v. Noel*,[311] the Mississippi Supreme Court addressed the issue of "reckless disregard" in the context of a case of a mistaken identify.[312] Subsequent to a shoplifting incident at a grocery store, the store's manager gave the police a description of the two black males involved as well as the license plate number of the truck they were driving.[313] An Officer Luckett took down the information, but when preparing the arrest affidavit for the two suspects, mistakenly substituted the name of the truck's owner, that of a black *female*, for one of the actual perpetrators.[314] After her arrest and detention for ninety minutes, the female plaintiff sued the arresting officer for false arrest and imprisonment, whereupon the officer raised the "police protection" exemption.[315] The court decided that the arresting officer merely complied with the affidavit and thus did not act with reckless disregard.[316] The court, however, further found Officer Luckett acted intentionally and with reckless disregard when he knew or should have known that the perpetrators were both male, and wrongly listed a female as the perpetrator.[317]

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[306] Turner v. City of Ruleville, 95-CA-00880-SCT, at *5 (Miss. Mar. 25, 1999).

[307] No. 2:96CV159-B-B, 1998 WL 97287, at *1 (N.D. Miss. Jan. 28, 1998).

[308] *Smith*, 1998 WL 97287, at *1.

[309] *Id.* at *1.

[310] *Id.* at *2.

[311] 715 So. 2d 174 (Miss. 1998).

[312] *Foster*, 715 So. 2d at 176.

[313] *Id.* at 175-76.

[314] *Id.* at 176.

[315] *Id.* at 176, 178-79.

[316] *Id.* at 179.

Mississippi's federal courts have determined that certain acts constitute "reckless disregard." In *Franklin v. Calhoun County*,[318] where a D.U.I. arrestee was placed in a cell with thirty other inmates and assaulted by several of them, the district court denied the County's motion for summary judgment on the basis of the "police protection" exemption, stating that the sheriff's knowledge of the circumstances of the plaintiff's incarceration could have amounted to a "reckless disregard" of the plaintiff's safety and well-being.[319]

Again, in *Gammill v. Langdon*,[320] the district court ruled that an officer's act of slamming the plaintiff's head onto the cruiser's hood, after the plaintiff had informed the officer that he had recently undergone surgery to his neck, encompassed "reckless disregard" for the plaintiff's safety and well-being, warranting denial of the City's Motion to Dismiss on grounds of the "police protection" exemption.[321]

Apparently, where the courts find that an officer has acted in a grossly negligent fashion, they do not hold such conduct to be in "reckless disregard" of a claimant's safety and well-being. However, when an officer acts with intent to harm, or in total disregard of a claimant's safety and well-being to the extent that intent may be inferred by such conduct, then the courts have found such acts to constitute "reckless disregard."

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[317] *Id.*

[318] No. 3:96CV143-B-B, 1997 WL 206765, at *1 (N.D. Miss. Apr. 10, 1997).

[319] *Franklin*, 1997 WL 206765, at *1-2.

[320] No. CIV. A. 1:96CV341-DA, 1998 WL 94821, at *1 (N.D. Miss. Jan. 21, 1998).

[321] *Gammill*, 1998 WL 94821, at *4-5. The *Gammill* court refused to be guided by the *Turner v. City of Ruleville* decision because *Turner* was still before the Mississippi Supreme Court for rehearing, and the district judge was "confident" that on rehearing, the Supreme Court would "remedy this oversight" in determining that the mental state required to invoke "reckless disregard" was that of an intentional tort. *Id.* at *4 n.4, *5 n.5. One may only hope that the federal district court did in fact find that Officer Langdon acted with intent, rather than simply disregarding the law as pronounced by the Mississippi Supreme Court because it found the court's reasoning in *Turner* to be an "oversight."

(iii) What Is "Criminal Offense"?

Even if an officer acts with reckless disregard for the rights of a citizen, if that citizen is at the time engaged in the commission of a crime, then neither the officer nor the public entity may be held liable for the officer's reckless or intentional act by virtue of the "criminal offense" language of subsection (c).[322] Thus, the obvious question is: What constitutes a "criminal offense?"

In *Moore v. Carroll County*,[323] the district court held that a deputy's accidental shooting of a man resisting arrest, even if done with reckless disregard for the arrestee's safety, was an act immunized by the police protection exemption because the plaintiff's act of resisting arrest was a "criminal offense."[324] Conversely, in *Gammill v. Langdon*, the district court decided that, although the plaintiff had been arrested for committing a crime, he was no longer committing any crime when, after being handcuffed, his head was slammed down onto the vehicle by the arresting officer.[325] Therefore, the court ruled the County could be held liable for the officer's "reckless disregard" of the plaintiff's well-being and safety.[326]

It appears, therefore, that a "criminal offense" is an act which could conceivably result in a charge or conviction of a crime. But for that aspect of this exemption to apply, the plaintiff must be committing a crime at the time he is injured; once the arrest is consummated, the criminal act which serves as the basis for the arrest ends, thereby extinguishing any further right to raise the "criminal offense" aspect of the "police protection" defense.

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[322] MISS. CODE ANN. § 11-46-9(1)(c) (Supp. 1998).

[323] 960 F. Supp. 1084 (N.D. Miss. 1997).

[324] *Moore*, 960 F. Supp. at 1092.

[325] *Gammill*, 1998 WL 94821, at *4.

[326] *Id.* at *5.

(d) Based Upon the Exercise or Performance or the Failure to Exercise or Perform a Discretionary Function or Duty on the Part of a Governmental Entity or Employee Thereof, Whether or Not the Discretion is Abused

Historically the bulwark of governmental immunity, the discretionary exemption is perhaps the one most often pled in Immunity Act cases for the purpose of avoiding governmental liability for negligent acts of governmental employees. As of this writing, the Mississippi Supreme Court has not provided a definition of "discretionary" in the context of the new Governmental Immunity Act. Thus far, the court has only defined "discretionary" in the pre-Act context and has decided one Immunity Act case without providing a new definition.[327]

Under pre-Immunity Act law, acts or decisions held to be discretionary have included: a police officer driving in hot pursuit of a fleeing suspect,[328] deciding whether roads, bridges and culverts should be improved or repaired,[329] deciding where to place stop signs or other traffic devices,[330] deciding whether to place a barricade on a city street,[331] establishing policy regarding medical treatment,[332] and the hiring of employees and coordinating and supervising a college baseball program.[333] Activities held to be ministerial during the same period include: providing medical treatment amounting to malpractice,[334] obtaining and authorizing a search warrant,[335] attempting construction of county road bridges in accordance with statutory specifications,[336] failing to perform a statutorily mandated duty,[337] and a county employee driving a vehicle in a non-emergency situation.[338]

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[327] The Immunity Act case involving the new discretionary exemption, *State v. Hinds County Board of Supervisors*, 635 So. 2d 839 (Miss. 1994), applied the exemption to bar a plaintiff's claim for damages for the Legislature's passage of an allegedly unconstitutional statute. *Hinds County Bd. of Supervisors*, 635 So. 2d at 842. Unfortunately, that decision offered no insight regarding the analysis the court applied vis-a-vis the discretionary exemption.

[328] *See* Mosby v. Moore, 716 So. 2d 551, 558 (Miss. 1998) (stating that officer used his discretion when he decided how best to chase fleeing suspect).

[329] *See* Mohundro v. Alcorn County, 675 So. 2d 848, 853 (Miss. 1996) (stating Board of Supervisors' decision as to which roads and bridges to improve was based upon economic factors and thus, discretionary); *see also* State v. Lewis, 498 So. 2d 321, 323 (Miss. 1986).

[330] Webb v. County of Lincoln, 536 So. 2d 1356, 1358-59 (Miss. 1988).

[331] *See* City of Jackson v. Brown, 97-CA-00359-SCT, 1998 WL 909535, at *5 (Miss. Dec. 31, 1998) (stating decision whether to place barricade on road under construction was discretionary).

[332] *See* Womble v. Singing River Hosp. Sys., 618 So. 2d 1252, 1262-65 (Miss. 1993) (stating discretionary exemption did not protect general malpractice, but did protect establishment of malpractice and other medical policies). *But see* Barnes v. Singing River Hosp. Sys., 97-CA-01552-SCT, 1999 WL 22325, at *2 (Miss. Jan. 21, 1999) (refusing "to extend the holding in *Womble* to lift statutory immunity in

However, the Mississippi Supreme Court has offered several different definitions of "discretionary" in the pre-Act context. In *Pruett v. City of Rosedale*,[339] the court, clarifying its position that it had not abolished common law discretionary immunity, stated:

> Judicial review of basic policy-making decisions continues to be regarded by many as inappropriate because courts have no standards by which to judge such decisions. . . . The reasonable man standard of tort law is not an appropriate measure for the political, social or economic desirability of government programs and the methods selected for pursuing them. . . .

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medical malpractice cases against state hospitals"); Sparks v. Kim, 701 So. 2d 1113, 1115 (Miss. 1997) (declining to extend *Womble* decision "to situations involving medical treatment decisions made by doctors working in the jails and prisons of this State").

[333] *See* Quinn v. Mississippi State Univ., 720 So. 2d 843, 848 (Miss. 1998) (stating common law immunity is designed to protect public officials when making decisions and formulating policies that are for public good).

[334] *See Womble*, 618 So. 2d at 1262-65 (stating common law immunity designed to protect policy making decisions, but not negligent implementation of policies).

[335] *See* Barrett v. Miller, 599 So. 2d 559, 568 (Miss. 1992) (stating that obtaining search warrant was discretionary act, but executing search warrant was ministerial function).

[336] *See* Coplin v. Francis, 631 So. 2d 752, 755 (Miss. 1994) (holding where statute requires certain specifications for width of bridges, governmental entity must provide them, and failure to do so is not protected by discretionary immunity).

[337] *See* Poyner v. Gilmore, 158 So. 922, 923 (Miss. 1935) (holding where clerk was statutorily required to file certain papers, failure to do so was not within his discretion, so he was afforded no common law immunity).

[338] *See* Stokes v. Kemper County Bd. of Supervisors, 691 So. 2d 391, 394-95 (Miss. 1997) (stating emergency driving requires some discretion; non-emergency driving is bound by rules of road and allows for no discretion).

[339] 421 So. 2d 1046 (Miss. 1982).

> [T]he decision maker must look to *considerations of public policy* and not merely to established professional standards or to standards of general reasonableness.[340]

The *Pruett* "policy" language has been cited in several later decisions.[341]

Conversely, numerous other cases have yielded other discretionary/ministerial definitions which focused upon the effect of legal mandates and employee judgment. For example, in *Mohundro v. Alcorn County*,[342] the court defined "discretionary" in the negative, stating:

> A duty is ministerial in nature when "the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependant upon the officer's *judgment or discretion*."[343]

This negative definition has been applied by Mississippi courts on numerous occasions in determining whether or not an act is discretionary.[344] The central focus of this analysis is usually that of an employee's judgment or choice made in the face of alternatives.[345]

This presumably raises a critical question, namely, whether Mississippi utilizes the "discretionary-ministerial" standard or the "policy-operational" analysis when determining whether an act or omission is of the "discretionary" variety in the Immunity Act context.

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[340] *Pruett*, 421 So. 2d at 1051-52 (emphasis added).

[341] Several cases that have cited the *Pruett* "policy" language focused on the immunity granted to policy-making decisions, as opposed to the negligent implementation of policies, which has been held to be ministerial and thus, not immunized. *See, e.g.*, Van Ovost v. City of Ackerman, 147 F.R.D. 112, 116 (N.D. Miss. 1993); Quinn v. Mississippi State Univ., 720 So. 2d 843, 848 (Miss. 1998); Womble v. Singing River Hosp. Sys., 618 So. 2d 1252, 1263 (Miss. 1993).

[342] 675 So. 2d 848 (Miss. 1996).

[343] *Mohundro*, 675 So. 2d at 853 (emphasis added) (citing Coplin v. Francis, 631 So. 2d 752, 754 (Miss. 1994)).

[344] Several cases have focused on the judgment and discretion utilized by a public employee or the basis for applying the common law discretionary immunity. *See, e.g.*, Mosby v. Moore, 716 So. 2d 551, 555 (Miss. 1998); T.M. v. Noblitt, 650 So. 2d 1340, 1342 (Miss. 1995); *Coplin*, 631 So. 2d at 754.

[345] *See id.*; State v. Lewis, 498 So. 2d 321, 323 (Miss. 1986).

While attempting to fathom this conundrum, we may review federal and sister state courts' definitions of "discretionary," and then apply the reasoning of those decisions to the language previously utilized by our court concerning its "discretionary-ministerial" decisions to determine which analysis it will apply to subsequent Mississippi Governmental Immunity Act cases.

An oft-cited United States Supreme Court case, *Dalehite v. United States*,[346] provides an excellent discussion of the meaning of "discretionary" in the Federal Tort Claims Act context. In *Dalehite*, the court stated:

> One only need read [28 U.S.C.A.] § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected government functions . . . . An analysis of [28 U.S.C.A.] § 2680(a), the [discretionary] exemption . . . excepts acts of discretion in the performance of governmental functions or duty "whether or not the discretion involved be abused. . . ." The "discretion" protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator *to act according to one's judgment of the best course* . . . . [This] includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for *policy judgment and decision, there is discretion.* It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of [the exemption] would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or non-action being directed by the

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[346] 346 U.S. 15 (1953).

superior, exercising, perhaps abusing discretion.[347]

As noted above, the key phrases in the court's analysis were (1) acting in accordance with one's judgment, and (2) making policy judgment decisions.[348] The *Dalehite* Court ultimately concluded that the cabinet-level decision to institute a fertilizer export program, the ceasing of experimentation with a hazardous material to determine when explosions might occur, the setting of the temperature during bagging, the type of bagging utilized, and the negligent manner of labeling fertilizer bags, all of which led to an explosion, were performed "under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department," and consequently constituted discretionary acts.[349]

Since the *Dalehite* decision was rendered, a crucial question has arisen in most jurisdictions as to whether a discretionary act, as contemplated by the Federal Tort Claims Act's discretionary exemption,[350] is one that requires the use of judgment only, or whether it must also implicate a policy decision. Various federal courts have disagreed on this point, some opting for the policy-oriented planning/operational mode of analysis,[351] while others have chosen the more expansive, judgment-oriented ministerial/discretionary mode of analysis.[352] Under the former, the federal courts look not to the existence of decision making, but rather to the nature of the decision making, i.e., "did the decision involve considerations that could affect the very existence or nature of the program, or merely a mechanical detail in its operation?"[353] Pursuant to the latter standard, the courts focus upon discretion, i.e., judgment or a conscious decision,[354] unfettered by legal mandates.[355]

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[347] *Dalehite*, 346 U.S. at 32-36 (emphasis added).

[348] *Id.* at 34, 36; *see also* Berkowitz v. United States, 486 U.S. 531, 536 (1988) (establishing familiar two-step planning/operational test for discretionary functions: (1) whether any statute, regulation or policy specifically prescribes course of action, and (2) if discretion is involved, whether act is based upon social, economic or public policy).

[349] *Dalehite*, 346 U.S. at 46.

[350] 28 U.S.C.A. § 2680(a) (1994).

[351] *See, e.g.*, Calderon v. United States, 123 F.3d 947, 951 (7th Cir. 1997) (applying discretionary immunity only to policy-making decisions and not to negligent implementing of same); Mahler v. United States, 306 F.2d 713, 723 (3d Cir. 1962) (same); Blessing v. United States, 447 F. Supp. 1160, 1170-75 (E.D. Pa. 1978) (same).

[352] *See, e.g.*, Coates v. United States, 181 F.2d 816, 817-19 (8th Cir. 1950) (rejecting one policy-making rational and finding for employee where no mandato-

This controversy has raged amongst the states ever since they began adopting their own tort claims acts replete with discretionary exemptions. In some instances, state legislatures decide the issue. For example, in *Harinek v. 161 North Clark Street, Ltd.*,[356] an Illinois court interpreted a tort claims act discretionary exemption,[357] which specifically mentioned "policy" and "discretionary" decisions as evidence of legislative intent to immunize only those acts that involved both an exercise of judgment and a policy determination.[358] Noting that the Kansas Legislature patterned its discretionary exemption[359] (which is also almost identical to Mississippi's) upon that of the Federal Tort Claims Act, the Kansas courts declared the discretionary exemption immunity applicable only to acts and omissions which involve judgment *and* a public policy deci-

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ry statutory guidelines existed); Olson v. United States, 93 F. Supp. 150, 152-53 (D.N.D. 1950) (same).

[353] *Blessing*, 447 F. Supp. at 1174 n.20.

[354] *See Olson*, 93 F. Supp. at 152-53.

[355] Regardless of which mode of analysis is utilized, all courts agree that where a statute or regulation prescribes a course of action, there is no discretion, and the discretionary exemption is no bar to any action predicated upon an employee's negligent failure to follow that law or regulation. *See* Jones v. New Orleans Aviation Bd., 572 So. 2d 1191, 1193 (La. Ct. App. 1990) (holding public duty exception is subject to policy-making/operational decision dichotomy); Rustici v. Weidemeyer, 673 S.W.2d 762, 769 (Mo. 1984) (holding that ministerial functions, which do not require discretion, are not immune).

[356] 692 N.E.2d 1177 (Ill. 1998).

[357] 745 ILL. COMP. STAT. ANN. 10/2-201 (1993) (stating that "employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion").

[358] *Harinek*, 692 N.E.2d at 1181 (holding fire marshal's conduct in planning and executing fire drill was discretionary).

[359] KAN. STAT. ANN. § 75-6104 (1997).

sion.[360]

Other state courts' definitions of "discretionary" have entirely excluded all reference to "policy decisions." The Georgia courts have interpreted their Tort Claims Act discretionary exemption[361] (which is practically identical to Mississippi's) to the effect that "[d]iscretionary acts are those calling for the exercise of personal deliberation and judgment, which entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed."[362] Missouri's courts have ruled that "a discretionary function is one in which the employee must exercise reason in the adaptations of means to an end and discretion in determining how or whether an act should be done."[363] Alabama's courts decided that no hard and fast rule may be applied to the analysis, and that discretionary acts are those "requiring exercise in judgment and choice and involving what is just and proper under the circumstances."[364]

The judgment-oriented ministerial/discretionary standard, often stated in a negative fashion, i.e., by defining what is ministerial and holding everything else to be discretionary, does not consider the type of decision made, but merely considers the resulting conduct, and labels it accordingly. For example, in jurisdictions utilizing this analysis, violating the rules of the road is a ministerial act,[365] and so is any act done pursuant to legal requirements with no room for discretion, such as the execution of legal process, which must be handled in a statutorily specified way.[366] But where an act leaves room for choice, such as which county roads should be better maintained,[367] or whether to comply with the Manual on Uniform Traffic Control Devices and place a stop sign at a "T" intersection,[368] then the act or decision is discretionary, and the governmental entity is immune from liability.

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[360] Carpenter v. Johnson, 649 P.2d 400, 402 (Kan. 1982).

[361] GA. CODE ANN. § 50-21-24(2) (1998).

[362] Christensen v. State, 464 S.E.2d 14, 18 (Ga. Ct. App. 1995).

[363] R.C. v. Southwestern Bell Tel. Co., 759 S.W.2d 617, 620 (Mo. Ct. App. 1988).

[364] Wright v. Wynn, 682 So. 2d 1, 2 (Ala. 1996).

[365] *See* Stokes v. Kemper County Bd. of Supervisors, 691 So. 2d 391, 395 (Miss. 1997).

[366] *See* Poyner v. Gilmore, 158 So. 922, 923 (Miss. 1935).

[367] *See* Webb v. Lincoln, 536 So. 2d 1356, 1358 (Miss. 1988).

The planning/operational analysis, on the other hand, considers two issues in determining whether acts are discretionary. To take advantage of a discretionary exemption in a state utilizing this standard, a governmental defendant must prove: (1) its employee utilized his or her judgment in making a choice, and (2) that this judgment involved or furthered a policy-making decision.[369] For example, the governmental decisions made in the *Dalehite* case, i.e., when to stop testing for explosions and how to label fertilizer bags, were decisions that clearly furthered a public policy, and the court concluded that holding the government liable for such decisions would adversely affect the effective administration of the government's fertilizer export program.[370]

An excellent example of the policy/operational analysis is found in the case of *Kaisner v. Kolb*.[371] Noting that planning-level decisions were immune and operational decisions were not, the *Kolb* court cited Florida's four prong test for distinguishing between discretionary and ministerial acts: (1) does the challenged act, omission or decision necessarily involve a basic governmental policy, program or objective; (2) is it essential to the realization of any such policy, as opposed to one which would not change the policy's course or direction; (3) does the act require basic policy evaluation or judgment; and (4) does the agency involved possess the lawful authority to act in that fashion?[372] If all four of these questions may be answered in the affirmative, then the act in question is discretionary; if not, then the act is operational (i.e., ministerial), and not immunized.[373]

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[368] *See Webb*, 536 So. 2d at 1357, 1359; *see also* Miller v. United States, 710 F.2d 656, 663 (10th Cir. 1983) (holding that highway construction statutes did not provide "fixed or readily ascertainable standard;" therefore, decisions made pursuant to them were within discretionary function exception); Peavler v. Board of Comm'rs, 528 N.E.2d 40, 47 (Ind. 1988) (holding that whether decisions to place or not to place traffic signals were discretionary is jury question); Carpenter v. Johnson, 649 P.2d 400, 403-06 (Kan. 1982) (holding that whether placement of traffic sign was discretionary was question of fact for jury); Jones v. Mississippi Dep't of Trans., 96-0014, at 8 (Tunica Co. Cir. Ct. 1998) (holding that failure to warn of intersection was discretionary act).

[369] *See Peavler*, 528 N.E.2d at 42-46 (holding county negligent for not placing signs at intersections absent proof of decision-making with regard to placement).

[370] Dalehite v. United States, 346 U.S. 15, 17 (1953).

[371] 543 So. 2d 732 (Fla. 1989).

The *Kolb* court observed that the plaintiff had alleged that an officer negligently placed him in danger of other traffic while ticketing him on the side of the roadway subsequent to a traffic arrest.[374] The court then decided that the officer's decision as to where the arrested driver should stand on the roadside did not involve a basic governmental policy, nor was it essential to the realization of any policy, since there were safer methods of ordering motorists to the roadside than the one the officer utilized.[375] The court further reasoned that the act did not require basic policy evaluation or expertise because it merely concerned the way a "policy is implemented, not its fundamental wisdom."[376] Although the court concluded that the fourth prong of the test had been met, i.e., the officer had lawful authority to pull motorists to the roadside, because three of the tests were not satisfied, and the failure to satisfy any one prong dooms immunity, then the State was liable to the plaintiff for negligently performing an operational act.[377] The court rejected the State's argument that the officer utilized his discretion in deciding where to place the motorist on the roadway, thereby invoking discretionary immunity, stating that the courts were not infringing on the government's establishment of a roadside policy, but were instead holding the State liable for a negligent implementation of such a policy.[378]

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[372] *Kolb*, 543 So. 2d at 737 (citing Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1019 (Fla. 1979)). *See* Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912, 918 (Fla. 1985) (holding initial policy decisions concerning inspecting and certifying construction of condominiums was discretionary).

[373] *Commercial Carrier Corp.*, 371 So. 2d at 1019.

[374] *Kolb*, 543 So. 2d at 733.

[375] *Id.* at 737.

[376] *Id.*

[377] *Id.* at 737-38.

[378] *Id.* at 738. Compare *Hall v. Mississippi Dep't of Pub. Safety*, 96-CA-00832-SCT, at 8-9 (Miss. 1998), an unpublished opinion with no precedential value,

While definitions and analyses are helpful in explaining the theoretical differences between the two discretionary standards, a comparison between decisions in two opposing states may best serve to demonstrate the practical differences between the two doctrines. Georgia's courts utilize the judgement-oriented discretionary analysis, as stated in the seminal common law immunity decision of *Hennessy v. Webb*.[379] In *Hennessy*, the Georgia Supreme Court declared that "where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him . . . he is usually given immunity from liability . . . [for] erroneous decisions."[380] The court defined ministerial acts as "duties required by law,"[381] and further described discretionary acts as lying midway between judicial and ministerial acts.[382] The Georgia Court of Appeals added:

> A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.[383]

After the passage of the Georgia Tort Claims Act[384] in 1991, Georgia courts were confronted with the Act's discretion-

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wherein the Mississippi Supreme Court implied that an officer's decision to position a motorist between his cruiser and the motorist's vehicle during a roadside traffic stop was a discretionary decision, even though the cruiser slipped out of gear and rolled into one motorist, injuring him.

[379] 264 S.E.2d 878 (Ga. 1980).

[380] *Hennessy*, 264 S.E.2d at 880.

[381] *Id.*

[382] *Id.*

[383] Joyce v. Von Arsdale, 395 S.E.2d 275, 276 (Ga. Ct. App. 1990) (quoting Miree v. United States, 490 F. Supp. 768, 774 (N.D. Ga. 1980)), *superseded by statute as stated in* Northwest Georgia Reg'l Hosp. v. Wilkins, 469 S.E.2d 786, 788 (Ga. Ct. App. 1996) (stating that "[a]lthough [this] case[] may provide some guidance, the statutory definition of 'discretionary' is narrower than that of the earlier case law").

[384] GA. CODE ANN. § 50-21-20 to -37 (1998).

ary exemption, which avoided liability for losses resulting from "the exercise or performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion involved [wa]s abused."[385] Upholding the reasoning of *Hennessy* and its progeny, the Georgia courts affirmed their previously utilized common law judgment-oriented analysis, again declaring that "discretionary acts are those calling for the exercise of personal deliberation and judgment."[386]

Utilizing this analysis, the Georgia Court of Appeals has ruled that a county deputy sheriff's high-speed response to another officer's emergency call was a discretionary act, even though performed negligently and in a manner leading to an automobile collision in an intersection.[387] The court said that although the officer was negligent as a matter of law when he drove through the intersection without his siren activated, his "decision to speed to the emergency scene constituted a discretionary act for which he enjoyed immunity."[388]

Again, in *Christensen v. State*,[389] the court reiterated its use of the judgment-oriented discretionary analysis and dismissed the plaintiff's complaint for wrongful parole supervision and mental health treatment of a parolee who resorted to rape after his release.[390] The court stated that a state hospital's negligent denial of treatment for a sex offender, and its decision concerning admission or discharge of an inmate patient were "discretionary act[s] cloaked with immunity."[391] Although the Georgia courts have ruled that an employee's negligent compliance with an agency's directive is a ministerial act,[392] they have steadfastly refused to apply the policy-oriented planning/operational analysis in their decisions concerning the discretionary exemption. Consequently, whether an act is one which furthers governmental policy is of no consequence in Georgia; the only crucial factor is whether the employee exercised his or her decision-making judgment in the absence of controlling legal standards.

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[385] GA. CODE ANN. § 50-21-24(2) (1998).

[386] Christensen v. State, 464 S.E.2d 14, 18 (Ga. Ct. App. 1995). The court held parole supervision was a discretionary act. *Christensen*, 464 S.E.2d at 18.

[387] Gilbert v. Richardson, 440 S.E.2d 684, 686-87 (Ga. Ct. App. 1994).

[388] *Gilbert*, 440 S.E.2d at 686.

[389] 464 S.E.2d 14 (Ga. Ct. App. 1995).

[390] *Christensen*, 464 S.E.2d at 18.

[391] *Id.* at 17-18.

[392] *See* Joyce v. Van Arsdale, 395 S.E.2d 275, 276-77 (Ga. Ct. App. 1990) (holding that employee's closing of bridge after being ordered to do so by county office was a ministerial act), *superseded by statute as stated in* Northwest Georgia Reg'l

Such is not the case in Florida. In *Trianon Park Condominium Ass'n v. City of Hialeah*,[393] the Florida Supreme Court declared that it would henceforth apply the planning/operational analysis to questions concerning discretionary acts[394] under the purview of the Florida Governmental Immunity Act.[395]

Several Florida cases ably demonstrate the manner in which the Florida courts utilize the planning/operational analysis, and indicate how that analysis differs from Georgia's. In *State Department of Health and Rehabilitation Services v. Yamuni*,[396] a Florida court entertained an adoptive mother's complaint against the department of health for negligently failing to detect child abuse following a report of the abuse to the department.[397] After the State raised the discretionary immunity defense, the court utilized the four-prong test adopted in *Commercial Carrier Corp.* to find that the caseworker's negligence in failing to detect the abuse was operational, thereby defeating the government's immunity claim.[398] Conceding that the caseworker's acts involved basic governmental policy or programs, and that the department had legal authority to carry out its objectives, the court nevertheless determined that the caseworker's investigative decisions could not change the course or direction of the department's services.[399] Rejecting the State's argument that the caseworker's decisions called for

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Hosp. v. Wilkins, 469 S.E.2d 786, 788 (Ga. Ct. App. 1996).

[393] 468 So. 2d 912 (Fla. 1985).

[394] *Trianon Park Condominium Ass'n*, 468 So. 2d at 918-19.

[395] FLA. STAT. ANN. § 768.28 (1997).

[396] 498 So. 2d 441 (Fla. Dist. Ct. App. 1986).

[397] *Yamuni*, 498 So. 2d at 442.

[398] *Id.* at 443-44.

[399] *Id.* at 443.

discretion, the court added that "a caseworker need not reflect upon basic policy in deciding whether to make a personal visit rather than a telephone call, nor does [he] require policy expertise to determine if a child abuse report is unfounded."[400]

The *Yamuni* decision may be contrasted with two Georgia decisions, *Christensen v. State*[401] and *Price v. Owen*,[402] wherein the Georgia courts found that a state hospital employee's decision to release a potential rapist without further medical treatment,[403] and a prison camp warden's decision to allow "convicts to roam the [county] roads" without adequate supervision,[404] were discretionary decisions requiring some degree of judgment. The Georgia cases did not discuss whether those decisions were based upon policy, or what effect they could have upon the course and direction of future governmental services.

In *Palm Beach County Board of Commissioners v. Salas*,[405] the Florida Supreme Court ruled that although a county's initial decision to place a left turn signal at an intersection was a planning-level decision, "[its] later decision to deactivate th[e] signal and block off the left turn lane for road maintenance was an operational-level decision" not shielded by immunity.[406] The court noted that the first prong of the test was not met, i.e., the act did not concern policy or planning.[407] Conversely, a Georgia court, unfettered by the planning/operational analysis, held that county officials' decision not to replace a downed stop sign was a discretionary act because they were under no absolute duty to act in any particular way.[408]

The question remains, then, as to which analysis the Mississippi Supreme Court will utilize under the purview of the new Governmental Immunity Act. An argument could certainly be made that Mississippi will adopt, or has already adopted, the judgment-oriented standard. Our courts have applied the discretionary judgment analysis in numerous cases,[409] and the fact that they have also previously ruled that policy decisions are discretionary acts does not necessarily support the conclusion that they favor the policy standard, for policy decisions are immunized pursuant to both standards. It could further be argued that the public policy reasoning espoused in *Pruett v. City of Rosedale*[410] was solely intended as language defining common law discretion under Mississippi's old government function proprietary dichotomy, and that this language was entirely supplanted by the discretionary exemption of the new Governmental Immunity Act, which mentions nothing about policy or planning as a basis for immunity.

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[400] *Id.* at 443-44.

[401] 464 S.E.2d 14 (Ga. Ct. App. 1995).

[402] 19 S.E.2d 529 (Ga. Ct. App. 1942).

[403] *Christensen*, 464 S.E.2d at 18.

[404] *Price*, 19 S.E.2d at 533.

[405] 511 So. 2d 544 (Fla. 1987).

[406] *Salas*, 511 So. 2d at 546.

[407] *Id.*

[408] Gregory v. Cardenaz, 402 S.E.2d 757, 758 (Ga. Ct. App. 1991).

One federal court decision supplies another good argument in favor of this position. In *Moore v. Carroll County*,[411] the court ruled that a sheriff's arming of a deputy sheriff with allegedly insufficient training constituted a discretionary act.[412] In so ruling, the court cited the Mississippi Supreme Court's decision of *Coplin v. Francis*[413] for authority to apply the ministerial discretionary analysis. The court stated that the Mississippi Supreme Court "distinguishes between 'those actions which inherently require the exercise of individual judgment and those which are positively imposed by law.'"[414] The court further cited *Coplin* for the proposition that when deciding whether an act is immunized by § 11-46-9(d) of the Mississippi Code, "the most important criterion, perhaps, is that [if] the duty is one which has been positively imposed by law . . . not being dependant upon the officer's judgment or discretion, the act and discharge thereof is ministerial."[415] Clearly, in attempting to provide an analysis that it believed would be the one utilized by the Mississippi Supreme Court, the *Moore* court applied the judgment-oriented discretionary analysis and made no mention of the "policy/operational" standard.[416]

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[409] *See, e.g.,* Freeman v. Jackson County Sheriff's Dep't, 97-CA-00119-COA, slip op. at 11-12 (Miss. Ct. App. Aug. 8, 1998) (applying "personal deliberation, decision and judgment" language of common law cases in support of applying judgment-oriented discretionary analysis).

[410] 421 So. 2d 1046 (Miss. 1982).

[411] 960 F. Supp. 1084 (N.D. Miss. 1997).

[412] *Moore*, 960 F. Supp. at 1093.

[413] *Id.* (citing Coplin v. Francis, 631 So. 2d 752, 753-54 (Miss. 1994)). The *Coplin* decision strongly bolstered the case for the application of the judgment-oriented discretionary analysis to the discretionary exemption. First, the court stated that the "classic" definition of a ministerial function is that provided in *Poyner v. Gilmore*, 158 So. 922, 923 (Miss. 1935), which is the negative definition of discretionary. *Coplin*, 631 So. 2d at 753-54. Second, the court specifically described "discretion" as utilizing one's judgment. *Id.* at 753. Third, the court engaged in no discussion whatsoever of the policy-oriented planning/operational analysis. But the best argument against this position is that *Coplin* merely serves as authority for what constituted "discretionary acts" for purposes of individual employee qualified immunity, and not for governmental immunity, the State being absolutely immune at the time *Coplin* was decided.

However, as we cannot be absolutely certain of the direction our court will take and because experience is most often the best of guides, it may be wise to simply offer examples of decisions reached by other courts utilizing the two analyses and to allow the reader to reach his or her own conclusion about which mode of analysis best represents the Mississippi Legislature's intentions with regard to the new discretionary exemption.

In other jurisdictions where the courts utilized the judgment-oriented ministerial/discretionary analysis, the following acts were immunized as discretionary acts, decisions, or omissions: police employees supervising, overseeing, and maintaining a 911 emergency number system,[417] Department of

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[414] Moore, 960 F. Supp. at 1093 (citing *Coplin*, 631 So. 2d at 753).

[415] *Id.* (citing *Coplin*, 631 So. 2d at 754).

[416] *Id.* at 1093. *See* Freeman v. Jackson County Sheriff's Dep't, 97-CA-00119-COA, slip op. at 10-12 (Miss. Ct. App. Aug. 8, 1998) (holding that officers' use of choke hold and pepper spray in course of arrest, officers' decision to arrest, incarcerate, and file charges, and sheriff's alleged failure to properly train officers were discretionary acts, immunized by subsection (d)); *see also* L.W. v. McComb Separate Mun. Sch. Dist., 97-CA-01465-SCT (Miss. Mar. 31, 1999) (citing T.M. v. Noblitt, 650 So. 2d 1343, 1346 (Miss. 1995)); Pointer v. Gilmore, 158 So. 922, 923 (Miss. 1935), where our court again followed pre-Act law in applying a judgment-oriented standard to the Immunity Act's discretionary exemption.

[417] *See* R.C. v. Southwestern Bell Tel. Co., 759 S.W.2d 617, 620 (Mo. Ct. App.

Corrections employees evaluating an inmate patient,[418] doctor failing to order mammogram after detecting a lump in the patient's breast,[419] sheriff's office not responding to report that individual was lying on a roadway,[420] county attorney's giving of legal advice,[421] probation officer negligently supervising probationer who subsequently drove while intoxicated,[422] city official failing to make reasonable inspections of a multi-family unit which later burned,[423] county supervisor deciding when and how to work on county roads,[424] official deciding to install or maintain street lights near a football stadium,[425] failing to warn of condition of roof through which plaintiff fell,[426] performing of an autopsy,[427] deputy sheriff's

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1988) (holding that officers overseeing and maintaining 911 emergency systems were protected by common law discretionary immunity).

[418] *See* Christensen v. State, 464 S.E.2d 14, 17-18 (Ga. Ct. App. 1995) (dismissing rape victims' wrongful supervision complaint regarding release of inmate because of discretionary exemption).

[419] *See* Lohr v. Larsen, 431 S.E.2d 642, 645 (Va. 1993) (holding that state-employed physician was entitled to common law immunity for discretion used in deciding whether to order tests after discovering lump in patient's breast).

[420] *See* Parker v. Mineral County, 729 P.2d 491, 493 (Nev. 1986) (concluding that decision not to utilize limited resources to respond to report of emergency situation was immunized).

[421] *See* Franklin County v. Malone, 957 S.W.2d 195, 202 (Ky. 1997) (holding that common law immunity shielded county attorney when he gave legal advice to county officials).

[422] *See* Georgia Dep't of Corrections v. Lamaine, 502 S.E.2d 766, 768 (Ga. Ct. App. 1998) (defining discretionary act as calling for exercise of personal deliberation and judgment which involve examining facts, reaching conclusions, and acting on them in manner not already legally precluded).

[423] *See* Evon v. Andrews, 559 A.2d 1131, 1133-34 (Conn. 1989) (holding that common law immunity bars action against city officials who exercised judgment with regard to apartment inspections); *see also* Peele v. Dobbs, 396 S.E.2d 600, 601 (Ga. Ct. App. 1990) (concluding that inspector's failure to determine that chimney was defective during inspection was immunized by common law discretionary immunity).

[424] *See* Vickers v. Motte, 137 S.E.2d 77, 79 (Ga. Ct. App. 1964) (stating that public officers are vested with discretionary power that in absence of bad faith, shield them from liability when acting within scope of their duties).

[425] *See* Ochoa v. Taylor, 635 P.2d 604, 607-08 (Okla. 1981) (holding discretionary exemption shielded officials from liability for placing or not placing street lights).

[426] *See* Marion v. DeKalb County, 821 F. Supp. 685, 690 (N.D. Ga. 1993) (holding that discretionary exemption immunized city officials who requested bids for

running of a red light while responding to another officer's emergency call,[428] police officers deciding not to report downed stop sign at intersection,[429] negligently maintaining school door,[430] county selecting school bus route,[431] negligently supervising prisoners,[432] and policeman using great force in consummating an arrest of a suspect resisting arrest.[433]

Acts held ministerial pursuant to this analysis include: police officer making an arrest outside his jurisdiction and without a warrant,[434] sheriff transporting an involuntarily committed citizen to a state hospital,[435] city failing to activate flashing lights after discretionary decision made to place them

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roofing contractors without warning contractors about condition of roof).

[427] *See* Putthoff v. Ancrum, 934 S.W.2d 164, 170 (Tex. Ct. App. 1996) (holding that conduct of autopsy was immunized by discretionary exemption because medical procedures involve exercise of judgment).

[428] *See* Logue v. Wright, 392 S.E.2d 235, 237 (Ga. 1990) (holding that officer's decision to rush to scene without activating his flashing lights was discretionary and immunized by common law); Gilbert v. Richardson, 440 S.E.2d 684, 686 (Ga. Ct. App. 1994) (same).

[429] See Gregory v. Cardenaz, 402 S.E.2d 757, 758 (Ga. Ct. App. 1991) (holding that officers' failure to report downed stop sign at intersection where they were investigating accident was discretionary).

[430] *See* Hennessy v. Webb, 264 S.E.2d 878, 879-80 (Ga. 1980) (holding that school principal's decision to allow rug to be placed at door was discretionary).

[431] *See* Harrell v. Graham, 27 S.E.2d 892, 894 (Ga. Ct. App. 1943) (noting that directions for routing of bus were not alleged to be given individually rather than officially).

[432] *See* Price v. Owen, 19 S.E.2d 529, 533 (Ga. Ct. App. 1942) (holding that warden's supervision of prisoners was discretionary).

[433] *See* Sheth v. Webster, 137 F.3d 1447, 1454 (11th Cir. 1998) (holding that officer's decision to assist arresting officer in making arrest and arresting officer's decision, in absence of bad faith, to use certain arrest methods were discretionary, thereby shielding them from liability for false arrest and assault); Hegarty v. Somerset County, 848 F. Supp. 257, 269 (D. Me. 1994) (holding that police officers making "forcible entry to effectuate a warrantless arrest . . . and the subsequent use of deadly force" were discretionary acts).

[434] *See* Rustici v. Weidemeyer, 673 S.W.2d 762, 769 (Mo. 1984) (holding that officer's decision to make illegal arrest was not discretionary act under common law). *But cf. Hegarty*, 848 F. Supp. at 269 (noting that effectuating warrantless arrest was discretionary).

[435] *See* Sussex County v. Morris, 610 A.2d 1354, 1359 (Del. 1992) (holding sheriff's decision to use personal car to transport prisoner was ministerial).

on roadway,[436] county employee negligently operating bus,[437] failing to immediately convey information regarding child abuse to the appropriate child protective unit as required by statute,[438] city employee failing to eliminate and properly close a bridge and repair barricades after being ordered to do so,[439] airport manager failing to eliminate an acknowledged hazard,[440] police officer pursuing suspect without due regard for public's safety in a non-emergency situation,[441] principal spanking student with excessive force,[442] and an agency's director failing to make good on a promised offer of employment.[443]

On the other hand, many acts held to be immunized by courts following the judgment-oriented discretionary analysis have been found not to be immunized by courts applying the policy-oriented analysis. For example, the following acts were held to be outside the discretionary exemption in planning/operational jurisdictions: failing to properly inspect an apartment which subsequently burned,[444] failing to properly maintain low shoulder on a roadway,[445] state Youth Authority deciding to place youthful parolee in foster home where he assaulted his foster parent,[446] deciding to release a mental patient,[447] deciding how to construct and maintain parking lot,[448] and deciding the language to be used on a warning sign near a state lake.[449] Many of these acts would have been found to be discretionary under an application of the judgment-oriented standard.

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[436] *See* Holt v. State, 927 P.2d 57, 62 (Okla. Ct. App. 1996) (holding that although city's decision whether to install lights on approaches to dam was discretionary, once decision was made to do so, failure to activate flashing lights placed on scene was ministerial under the Tort Claims Act discretionary exemption).

[437] *See* Pavelka v. Carter, 996 F.2d 645, 648 (4th Cir. 1993) (finding court had governmental immunity and was liable only to extent it waived that immunity).

[438] *See* Boland v. State, 615 N.Y.S.2d 815, 822 (N.Y. Ct. Cl. 1994) (holding that statutory duty to immediately convey child abuse information to local child protective unit was ministerial).

[439] *See* Joyce v. Van Arsdale, 395 S.E.2d 275, 277 (Ga. Ct. App. 1990) (holding subordinate's failure to erect barricade in manner presented by official mandate was ministerial and not protected by common law discretionary immunity), *superseded by statute as stated in* Northwest Ga. Reg'l Hosp. v. Wilkins, 469 S.E.2d 786, 788 (Ga. Ct. App. 1996).

[440] *See* Miree v. United States, 490 F. Supp. 768, 775 (N.D. Ga. 1980) (holding that airport manager's failure to disperse birds or warn pilot of hazard was ministerial).

[441] *See* Martin v. Georgia Dep't of Pub. Safety, 357 S.E.2d 569, 573 (Ga. 1987) (holding that officer violated rules of road in pursuit of suspect and genuine issue existed as to whether he was covered by discretionary immunity, precluding summary judgment).

[442] *See* Crews v. McQueen, 385 S.E.2d 712, 716 (Ga. Ct. App. 1989) (holding that although corporal punishment was within principal's scope of authority, manner of carrying out punishment may not always be discretionary); Maddox v. Boutwell, 336 S.E.2d 599, 600 (Ga. Ct. App. 1985) (holding that punishment outside established school guidelines was not covered by discretionary immunity).

[443] *See* Oyler v. State, 618 P.2d 1042, 1053 (Wyo. 1980) (holding that director's actions with regard to prospective employees were not immune when his actions took him outside established employment guidelines).

The question, then, is whether Mississippi will have a broad discretionary exemption, one which immunizes all acts, omissions, and decisions involving judgment or choice where no compelling legal standards exist, or whether Mississippi courts will utilize the considerably more narrow planning/operational analysis, immunizing only those acts and decisions that implicate both judgment and consideration of a policy, program or plan. The answer to this question will be determined by the definition ascribed to "discretionary" by the Mississippi Supreme Court, when it chooses to address the issue in the Immunity Act discretionary exemption context.

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[444] *See* Tenhaff v. Quenqui, 571 So. 2d 898, 899 (La. Ct. App. 1990) (holding that statute requiring fire inspections left no discretion and that failure to make inspections not immunized by common law).

[445] *See* Strange v. South Carolina Dep't of Highways & Pub. Transp., 445 S.E.2d 439, 440 (S.C. 1994) (holding that department's failure to weigh competing considerations and adopt professional standards left it liable for failure to mark sides of highway).

[446] *See* Johnson v. State, 447 P.2d 352, 358 (Cal. 1968) (holding that to enjoy Tort Claims Act discretionary immunity, employee must show balancing of considerations in specific case in support of policy decision).

[447] *See* Nguyen v. State, 788 P.2d 962, 966 (Okla. 1990) (holding that decision to release mental patient was not discretionary under policy/operational analysis).

[448] *See* Robinson v. City of Bartlesville Bd. of Educ., 700 P.2d 1013, 1015-16 (Okla. 1985) (holding that under policy/operational Tort Claims Act discretionary analysis, decision to construct public improvement was discretionary, whereas use of reasonable standards of construction and maintenance was not discretionary).

[449] *See* Thibodeau v. Mayor of Morgan City, 619 So. 2d 595, 600 (La. Ct. App. 1993) (holding that decision regarding language to be used on warning signs was operational and not protected by discretionary immunity statute).

(e) Arising out of an Injury Caused by Adopting or Failing to Adopt a Statute, Ordinance or Regulation

In *State v. Hinds County Board of Supervisors*,[450] the Mississippi Supreme Court found the State immune from the plaintiff's constitutional tort action because exemption subsection (e) barred all claims based upon the Legislature's adoption of any statute.[451] This exemption has also been held to apply to the passage of ordinances, statutes and regulations by city and county governing bodies. For example, one court has held that a city council's enactment of an ordinance allowing the use of iron pipe in the town's water system was an immunized act, even though adequate research would have revealed that PVC pipe would not have corroded as easily.[452] That court rejected the plaintiff's argument that he had successfully pleaded negligent operation of the pipeline, stating that the true gravamen of the complaint was negligent passage of an ordinance, which constituted a totally immunized act.[453]

This exemption has even been upheld in the face of allegations of intentional torts. In *Madonna v. Giacobbe*,[454] it was held that a developer's suit against a city for tortious interference with contract and business relations was barred[455] by the ordinance exemption of the Illinois Local Governmental and Governmental Employees Tort Immunity Act.[456] Noting that the City had refused to pass an ordinance which would have allowed the plaintiff to consummate a contract with property owners to store water on their property because the property owners were involved in a lawsuit with the city, the court declared that "members of legislative bodies cannot be held personally liable for damages based upon their exercise of discretion" in passing or failing to pass ordinances.[457]

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[450] 635 So. 2d 839 (Miss. 1994).

[451] *Hinds County Bd. of Supervisors*, 635 So. 2d at 842.

[452] *See* Sawyer v. City of Sheridan, 793 P.2d 476, 477-78 (Wyo. 1990) (interpreting section 1-36-108(a) of Wyoming Statutes Annotated, which is ordinance adoption exemption similar to Mississippi's).

[453] *Sawyer*, 793 P.2d at 478.

[454] 546 N.E.2d 1145 (Ill. App. Ct. 1989).

[455] *Madonna*, 546 N.E.2d at 1152.

[456] 745 ILL. COMP. STAT. ANN. 10/1-101, 10/2-103, 10/2-205 (West 1993).

Clearly, then, no legislative body, or any other governmental entity empowered to pass statutes, ordinances, or regulations, may be held liable for passing or failing to pass any laws or regulations by virtue of exemption subsection (e).

(f) Which is Limited or Barred by the Provisions of Any Other Law

Numerous statutes immunize specific public entities from tort lawsuits. One such statute is § 61-5-47 of the Mississippi Code, which immunizes the State and all municipalities for any negligence in constructing, maintaining, enlarging, operating, or managing any airport or air navigation facility, so long as that entity has not purchased any liability insurance.[458] Section 41-13-15 of the Mississippi Code provides the same immunity for a public entity's operation of a community hospital.[459] Where such statutes exist, the public entities immunized by them may not be held liable for tortious acts, not only because the statute decrees it, but also because § 11-46-9(f) of the Mississippi Code makes it so.

(g) Arising out of the Exercise of Discretion in Determining Whether or Not to Seek or Provide the Resources Necessary for the Purchase of Equipment, the Construction or Maintenance of Facilities, the Hiring of Personnel and, in General, the Provision of Adequate Governmental Services

As part of its rationale for barring a plaintiff's claim for damages against the State, the Mississippi Supreme Court, in *State v. Hinds County Board of Supervisors*,[460] cited exemption subsection (g), apparently recognizing that this subsection immunized the State for the Legislature's decision not to provide more facilities for housing of state penitentiary inmates. Although the court did not elaborate on its reasons for applying this subsection, a New Jersey decision provides more insight into the basic principles attendant to this exemption.

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[457] *Madonna*, 546 N.E.2d at 1151 (citing Mahoney Grease Serv., Inc. v. City of Joliet, 406 N.E.2d 911, 914 (Ill. App. Ct. 1980)).

[458] *See Van Ovost v. City of Ackerman*, 147 F.R.D. 112, 121 (N.D. Miss. 1993) (holding that city could not be liable for torts unless airport had purchased liability insurance).

[459] *See* Womble v. Singing River Hosp., 618 So. 2d 1252, 1259 (Miss. 1993) (holding that hospital was immune from suit alleging tortious breach of duty to patient, and hospital's requirement that doctors purchase their own personal malpractice policies did not waive immunity).

Noting that a New Jersey Tort Claims Act exemption[461] (which is practically identical to Mississippi's subsection (g)) immunized public entities for decisions concerning the hiring of personnel, the court, in *Massaker v. Petraitis*,[462] ruled that the State could not be held liable for a court clerk's docketing delays of six to eight weeks which resulted in a lengthy delay of the docketing of a creditor's judgment and ultimately in his loss of priority among creditors.[463] Conceding the plaintiff's argument that docketing of judgments was a non-discretionary act, the court nevertheless held that the "decision to employ or not employ additional personnel to meet the backlog" was a decision subject to the immunizing cloak of the resource exemption, and the State could not be held liable "for its determination not to provide additional resources, equipment or personnel to speed up the process in order to eliminate the six to eight-week delay in docketing judgments."[464]

In so ruling, the *Massaker* court applied earlier, pre-Tort Claims Act common law precedent established by the New Jersey Supreme Court in the case of *Amelchenko v. Borough of Freehold*.[465] In *Freehold,* the court had found the State immune from liability for not transporting its workers to a municipal lot in time to remove snow that later caused the plaintiff's injury.[466] The court based its ruling upon the common law doctrine which gave municipalities a reasonable time to meet their responsibilities brought on by emergencies and the lack of adequate personnel and equipment.[467] This common law principle, the court concluded, was later adopted by the New Jersey Legislature in the form of the resources exemption.[468]

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[460] *Hinds County Bd. of Supervisors*, 635 So. 2d at 842.

[461] N.J. STAT. ANN. § 59:2-3(c) (West 1992).

[462] 414 A.2d 590 (N.J. Super. Ct. App. Div. 1980).

[463] *Massaker*, 414 A.2d at 592-93.

[464] *Id.* at 593.

[465] 201 A.2d 726 (N.J. 1964).

[466] *Amelchenko*, 201 A.2d at 733.

Clearly then, public entities are immune for failing to provide sufficient personnel and equipment essential to ensure adequate governmental services. However, meeting the burden of proof necessary to warrant the application of this exemption is an essential pre-condition to immunity. That burden has been held to be: (1) a showing that the employee or governing body consciously *made a decision,* for example, to hire three workers rather than six, and (2) that the decision to hire three instead of six had a causal role in injuring the plaintiff.[469] Absent such proof, this exemption would not immunize a governmental entity for damages caused by its lack of personnel or resources. Consequently, governmental entities seeking to utilize this exemption must be prepared to prove that they made a conscious decision to hire no further personnel or to obtain no more equipment, and that the plaintiff's injury was proximately caused by a lack of personnel, equipment, or facilities which could have prevented the plaintiff's injury.

(h) Arising out of the Issuance, Denial, Suspension or Revocation of, or the Failure or Refusal to Issue, Deny, Suspend or Revoke Any Privilege, Ticket, Pass, Permit, License, Certificate, Approval, Order or Similar Authorization Where the Governmental Entity or Its Employee is Authorized by Law to Determine Whether or Not Such Authorization Should Be Issued, Denied, Suspended or Revoked Unless Such Issuance, Denial, Suspension or Revocation, or Failure or Refusal Thereof, is of a Malicious or Arbitrary and Capricious Nature

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[467] *Id.* at 730-31.

[468] *Id.* at 733.

[469] Lopez v. City of Elizabeth, 584 A.2d 825, 831 (N.J. Super. Ct. App. Div. 1991).

This exemption, commonly referred to as the license exemption, involves more than just the issuance, revocation or denial of *licenses*; it also refers to privileges, tickets, passes, permits, certificates, approvals, orders and authorizations. These could arguably include anything from park passes to football tickets. Nevertheless, the body of law arising from this brand of exemption has primarily centered upon the issuance, revocation or denial of licenses.

Regarding licenses, it has been held that governmental entities are immune from liability for: failing to revoke a day care license which may have resulted in a child's injury,[470] negligently revoking a doctor's license,[471] unconstitutionally denying a nursing home license,[472] negligently issuing a temporary occupancy permit,[473] failing to issue a boxing license after the boxer passed a neurological exam,[474] and a city planning commission's approval of a subdivision plat which lacked provisions for a fence around a dangerous drainage ditch.[475]

Whether the grant, denial or revocation of any such license, privilege, pass, etc., is a negligent decision, act or omission, is not relevant to any inquiry concerning this subsection, nor is the question of whether or not the act, decision, or omission constituted a discretionary act.[476] If the issue concerns the grant, denial or revocation of any of those statutorily listed items, the governmental entity is immune from its actions taken in that regard, even if it acted negligently or abused its discretion.

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[470] *See* Pittman v. State, 558 N.W.2d 600, 601 (Neb. Ct. App. 1997) (applying sections 81-8, 209 of Revised Statutes of Nebraska, license exemption of Nebraska Tort Claims Act).

[471] *See* Howard v. Miller, 476 S.E.2d 636, 638 (Ga. Ct. App. 1996) (applying section 50-21-24(9) of Georgia Code, license exemption of Georgia Tort Claims Act).

[472] *See* Melbourne Corp. v. City of Chicago, 394 N.E.2d 1291, 1298 (Ill. App. Ct. 1979) (applying sections 2-104 and 2-106 of Illinois Compiled Statutes, license exemption of Illinois Tort Claims Act, which is almost identical to Mississippi's subsection (h)).

[473] *See* DeBry v. Noble, 889 P.2d 428, 442 (Utah 1995) (holding that county's actions were core governmental functions within scope of license exemption of Utah's Governmental Immunity Act).

[474] *See* Colome v. State Athletic Comm'n, 55 Cal. Rptr. 2d 300, 306 (Cal. Ct. App. 1996) (applying license exemption in section 818.4 of California Code, which is practically identical to Mississippi's license exemption).

[475] *See* Loveland v. Orem City Corp., 746 P.2d 763, 777 (Utah 1987) (applying Utah's Governmental Immunity Act license exemption, section 63-30-10(1)(c) of Utah Code, which tracks Mississippi's subsection (h) almost verbatim).

[476] However, California courts have uniformly ruled that granting, denying or

The sole exception to immunization appears to be if the issuance, denial, or revocation is arbitrary or capricious. For example, where a city granted a plaintiff a building permit after the inspector concluded that the building met all statutory, code and regulation requirements, but the city nevertheless refused to issue a Certificate of Occupancy in the face of a California statute which required issuance after final inspection approval, the California court ruled that the city's refusal to issue the certificate was an abuse of discretion.[477] Although this California court characterized the city's decision not to issue the certificate as one *beyond the official's discretion*,[478] Mississippi's courts would probably have termed this manner of refusal to issue a certificate as "arbitrary and capricious." It appears that California and Mississippi agree on this principle, although they utilize different terms to reach the same conclusions.

The Mississippi Supreme Court has defined an "arbitrary" act as an act done without adequately determining the correct legal principle, and has defined a "capricious" act as one "done without reason . . . implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles."[479] Utilizing these standards, our court has found

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revoking licenses is a discretionary act, pursuant to the license exemption of California's Tort Claims Act. *See Colome*, 55 Cal. Rptr. 2d at 306; Thompson v. City of Lake Elsinore, 22 Cal. Rptr. 2d 314, 349 (Cal. Ct. App. 1993). In California, the issue of whether the employee has overstepped the protection of the exemption is not whether his act was arbitrary or capricious, but whether it constituted an abuse of discretion.

[477] *Thompson*, 22 Cal. Rptr. 2d at 350. In *Thompson*, the court stated that the negligent determination that a building does not meet Code standards, leading to the denial of a certificate, was not legally reviewable. *Id.*

[478] *Id.*

[479] Mississippi State Dep't of Health v. Southwest Miss. Reg'l Med. Ctr., 580 So. 2d 1238, 1240 (Miss. 1991) (quoting *In re* Housing Auth. of City of Salisbury, 70 S.E.2d 500, 503 (N.C. 1952)).

governmental acts to be "arbitrary and capricious" whenever officials have acted in contravention of established law.

Acts found by our court to be "arbitrary and capricious" include: the State Board of Psychological Examiners' refusal to issue a psychiatrist's license where a state statute[480] provided that licenses "shall" be issued upon the filing of a proper application,[481] the Real Estate Commission's revocation of a broker's license, although the broker had clearly not violated one of the Commission's rules and revocation was authorized only when a rule had been violated,[482] the State Oil and Gas Board's denial of an applicant's request for a permit to operate a salt water disposal well, where the board failed to make the findings required by a state statute[483] relative to the waste prevention aspects of the plaintiff's proposed system,[484] and a city council's refusal to award a public funds contract to the lowest bidder in the face of a statutory requirement to do so.[485]

Although most of these cases were decided prior to the passage of the Immunity Act, any governmental entity's grant, revocation or denial of a license, certificate, pass, etc., in direct contravention of law, should be held by our court to be arbitrary or capricious, thereby defeating the immunizing cloak of the license exemption. On the other hand, where governmental entities did not violate any law in deciding whether to grant, deny, or revoke licenses, permits, etc., our court should hold those acts to be immunized from liability by this particular exemptio.[486]

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[480] MISS. CODE ANN. § 73-31-13 (Supp. 1998).

[481] *See* State Bd. of Psychological Exam'rs v. Coxe, 355 So. 2d 669, 671 (Miss. 1978) (concluding statute mandating that agency shall issue license after certain conditions are met leaves no room for denial of license after plaintiff meets those conditions).

[482] *See* Mississippi Real Estate Comm'n v. White, 586 So. 2d 805, 808-09 (Miss. 1991) (holding Real Estate Broker's License Act's directive requiring brokers to deposit certain checks in escrow was couched in mandatory language; therefore, it was not arbitrary and capricious for Board to revoke broker's license when he failed to deposit such check in escrow).

[483] MISS. CODE ANN. §§ 53-1-1 to -101 (1990 & Supp. 1998).

[484] *See* McGowan v. Mississippi State Oil & Gas Bd., 604 So. 2d 312, 324 (Miss. 1992) (holding board not arbitrary in failing to act within thirty days where statute requiring action within thirty days was directory only, not mandatory).

[485] *See, e.g.,* Sunland Publ'g Co. v. City of Jackson, 710 So. 2d 879, 884 (Miss. 1998) (holding (1) city's failure to give legal publishing business to lowest, qualified bidder on public contract was arbitrary and capricious when statutes required municipalities to award contract to lowest, qualified bidder, and (2) city councilman's personal opinion that low bidder was simply trying to put competitor out of business by submitting lowest bid was insufficient finding that low bidder was not qualified).

Licensing acts which have been held by other state courts to be in contravention of law and not immunized by a license exemption include: granting a building permit to a builder without workers' compensations coverage, where the Labor Code required coverage,[487] issuing a building permit to an unlicensed contractor in violation of the Business and Professional Code,[488] and the Department of Motor Vehicles' issuance of a driver's license after the driver had been determined to be unfit for driving.[489]

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[486] *See, e.g.,* Montalvo v. Mississippi State Bd. of Med. Licensure, 671 So. 2d 53, 57-58 (Miss. 1996) (upholding board's decision not to reinstate physician's medical license where statute authorized denial on grounds of doctor's criminal convictions); HTI Health Servs. of Miss., Inc. v. Mississippi State Dep't of Health, 603 So. 2d 848, 853-54 (Miss. 1992) (holding that Department of Health's denial of hospital's certificate of need to establish adult cardiac catheterization services was not arbitrary and capricious because hospital failed to meet statutorily created minimum population base criterion for granting of certificate); Mississippi State Dep't of Health v. Southwest Miss. Reg'l Med. Ctr., 580 So. 2d 1238, 1241-42 (Miss. 1991) (same); *see also* Mississippi State Tax Comm'n v. Package Store, Inc., 208 So. 2d 46, 48 (Miss. 1968) (upholding State Tax Commission's denial of permit to operate package liquor store where building's location violated statutory restrictions against proximity to child day care facilities).

[487] *See* Morris v. County of Marin, 559 P.2d 606, 612 (Cal. 1977) (using "abuse of discretion" language similar to Mississippi's "arbitrary" terminology).

[488] *See* Young v. City of Inglewood, 154 Cal. Rptr. 724, 725 (Cal. Ct. App. 1979) (holding compliance with requirement that building permits be issued only to licensed or exempt contractors was mandatory duty not subject to immunity accorded discretionary activities of public utilities).

[489] *See* Trewin v. State of California, 198 Cal. Rptr. 263, 266-67 (Cal. Ct. App. 1984) (concluding that Department of Motor Vehicles had mandatory duty to refuse to issue or renew license if previously determined by examination that such person was unable to safely operate motor vehicle).

(i) Arising out of the Assessment or Collection of Any Tax or Fee

The Federal Tort Claims Act includes an exemption similar to Mississippi's subsection (i), which immunizes the government for "any claim arising in respect of the assessment or collection of any tax."[490] The federal courts interpreting this exemption have stated that this exemption "reflects 'the government's strong interest in protecting the administration of its tax system from the burden of constant litigation,'"[491] and have applied the exemption to both general and constitutional tort litigation.[492] They give this exemption a strict construction in favor of the government,[493] and apply it not only to the "persons against whom the tax collection efforts are directed, but also to actions by third parties injured by tax collection efforts."[494] This exemption, the federal courts have ruled, constitutes a jurisdictional defense.[495]

The federal courts applying this exemption have held that numerous acts were immunized by the tax collection or assessment exemption, including: Internal Revenue Service (IRS) threats during an audit,[496] levying on accounts receivable and then failing to collect the accounts,[497] levying on the wrong property,[498] an IRS agent's visiting a taxpayer's home and notifying the taxpayer's bank and tenant of delinquent taxes,[499] informing taxpayer's creditors of purported tax liability when no taxes were in fact owed, resulting in a taxpayer's loss of credit and business,[500] ordering a third party into a dangerous mine to retrieve a taxpayer's property,[501] seizing of a vehicle for non-payment of taxes,[502] harassment during an IRS criminal tax evasion investigation, including oppressive searches and seizures, telephone wiretaps, and interviews with the taxpayer's acquaintances and business contacts,[503] levying wages for taxes owed,[504] and unauthorized, erroneous levies on bank accounts.[505] However, at least one state court interpreting a similar tax exemption[506] has ruled that a claimant's suit for return of his property seized by state officials for non-payment of taxes was not barred by the exemption, as it was not a claim for damages, but was merely a replevin-type action for the return of seized property.[507]

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[490] 28 U.S.C.A. § 2680(c) (1990).

[491] Anderson v. Office of Att'y Gen., 890 F. Supp. 648, 650 (E.D. Mich. 1995) (quoting Interfirst Bank Dalles v. United States, 769 F.2d 299 (5th Cir. 1985)).

[492] *See* Jones v. United States, 16 F.3d 979, 981 (8th Cir. 1994) (holding that overreaching tax investigation via wire taps, searches and seizures, and violations of privacy, were immunized by tax exemption).

[493] *See* Perkins v. United States, 55 F.3d 910, 913 (4th Cir. 1995) (applying exemption to defeat liability for third party killed while attempting to recover items formerly owned by another taxpayer, which had been levied upon by Internal Revenue Service, but were now located in third party's mine shaft).

[494] *Perkins*, 55 F.3d at 913 (citing Murray v. United States, 686 F.2d 1320, 1324 (8th Cir. 1982)).

[495] *See* Morris v. United States, 521 F.2d 872, 874 (9th Cir. 1975) (stating that "the United States government may not be sued unless it has specifically waived its sovereign immunity").

[496] *See* Pugh v. Internal Revenue Serv., 472 F. Supp. 350, 352-53 (E.D. Pa. 1979) (dismissing tort claim for lack of subject matter jurisdiction where taxpayer sought relief for allegedly tortious conduct of IRS employees during audit).

[497] *See* United States v. Banner, 226 F. Supp. 904, 905 (N.D.N.Y. 1963) (stat-

There is no reason to believe that the straightforward

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ing that action for refund was barred by exemption for "any claim arising out of the assessment or collection of any fees").

[498] *See* Interfirst Bank Dallas v. United States, 769 F.2d 299, 307 (5th Cir. 1935) (stating that exception found in 28 U.S.C. § 2680(c) "gives no indication whatsoever that the exemption is limited to claims where an adequate alternative remedy is available or to claims brought by taxpayers as opposed to third parties," rather, it applies to all tax-related claims).

[499] *See* Paige v. Dillon, 217 F. Supp. 18, 20 (S.D.N.Y. 1963) (holding that 28 U.S.C. § 2680(c) specifically excepts any tax-related claim, including "felonious" taking of taxpayer's money).

[500] *Morris*, 521 F.2d at 874.

[501] Perkins v. United States, 55 F.3d 910, 913 (4th Cir. 1995) (construing all Federal Tort Claims Act exemptions in favor of sovereign).

[502] Fishburn v. Brown, 125 F.3d 979, 981-82 (6th Cir. 1997).

[503] Jones v. United States, 16 F.3d 979, 980-81 (8th Cir. 1994).

[504] Plant v. Internal Revenue Serv., 943 F. Supp. 833, 836 (N.D. Ohio 1996).

[505] *See* Weiner v. Internal Revenue Serv., 986 F.2d 12, 13 (2d Cir. 1993) (ruling that even though Internal Revenue Service entered into settlement agreement to return funds obtained from wrongful levy against taxpayer's pension account, she had no grounds to compel apology from IRS).

[506] See IDAHO CODE § 6-904A, which is identical to Mississippi's tax exemption statute.

[507] Greenwade v. Idaho State Tax Comm'n, 808 P.2d 420, 425 (Idaho Ct. App. 1991) (holding tort action for conversion is barred).

interpretation of the tax exemption by the federal courts would not be followed by Mississippi's supreme court. Practically speaking, the only action available to a taxpayer for unlawful or harassing tax collection practices would be a 42 U.S.C. § 1983 action against the individual state or local agents, or some other appropriate civil rights action.

(j) Arising out of the Detention of Any Goods or Merchandise By Any Law Enforcement Officer, Unless Such Detention is of a Malicious or Arbitrary and Capricious Nature

Both the federal and state cases interpreting exemptions of this kind have held that such exemptions immunized the act of *seizing* property, but not that of *storing* property. These courts have defined "detention" as "seizure," and, as did the Nebraska court in *Nash v. City of North Platte*,[508] have created a distinction between "(1) a claim based upon the *detention* of goods, which is barred by the [exemption]; and (2) a claim based upon *injury to or loss of the goods* while being detained, which [is] not barred."[509]

Essentially, this means that the seizure of goods, whether legal or illegal, is immunized by this exemption, but the law nevertheless requires that seized goods be returned to their owner in the same condition, and any loss thereof or injury thereto during their detention subjects the government to liability.[510]

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[508] 255 N.W.2d 52 (Neb. 1977), *overruled on other grounds by* Knight v. H & H Chevrolet, 337 N.W.2d 742 (Neb. 1983).

[509] *Nash*, 255 N.W.2d at 53 (emphasis added).

[510] *See* A-Mark, Inc. v. United States Secret Serv., 593 F.2d 849, 859 (9th Cir. 1978) (citing Alliance Assurance Co. v. United States, 252 F.2d 529, 534 (2d Cir. 1958)), *abrogated by* Kosak v. United States, 465 U.S. 848 (1984); Alliance Assurance Co. v. United States, 252 F.2d 529, 534 (2d Cir. 1958) (holding that exception "was not intended to bar actions based on the negligent destruction, injury or loss of goods in possession or control" of government), *abrogated by* Kosak v. United States, 465 U.S. 848 (1984); Ritter v. Castellini, 414 A.2d 614, 617-18 (N.J. Super. Ct. Law Div. 1980) (holding sheriff serving writ of attachment on property liable for all goods stolen therefrom).

(k) Arising out of the Imposition or Establishment of a Quarantine, Whether Such Quarantine Relates to Persons or Property

Interpreting the quarantine exemption of federal and state tort claims acts, the courts have uniformly ruled that the government cannot be held liable for quarantining livestock whether the animals quarantined are diseased or not. This exemption has also been held to apply to the quarantining of test samples from supposedly diseased livestock. For example, where the government quarantined cattle test samples and failed to timely provide a cattle owner with information that may have saved some of his livestock, the government was held to be immunized by a quarantine exemption.[511] Another court ruled that the government was not liable for damages for unnecessarily quarantining livestock, even though the owner was later forced to sell his livestock at a lower rate because of the quarantine.[512] Even where a plaintiff alleged that it was the misdiagnosis by a state veterinarian which proximately caused his loss rather than the negligently applied quarantine, a court ruled that the government shouldered no liability for its doctor's misdiagnosis because the plaintiff's damage was proximately caused by the quarantine.[513] However, where a plaintiff alleged that a state doctor's misdiagnosis resulted in a decision *not to impose* a quarantine, which in turn resulted in the death of much of his livestock from spread of disease that would have been prevented by a quarantine, the court decided that although the government could not be held liable for its negligent failure to impose a quarantine, the government doctor could be held liable for malpractice in misdiagnosing a disease.[514] The distinction between these two decisions may be that this exemption's cloak of immunity spreads wider to cover decisions imposing a quarantine than it does to cover decisions not to impose a quarantine.

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[511] *See* Saxton v. United States, 456 F.2d 1105, 1106 (8th Cir. 1972) (holding government's withholding of test samples and negligently informing of plaintiff that diseased livestock was free of hoof and mouth disease was covered by quarantine exemption).

[512] *See* Hubbard v. State, 163 N.W.2d 904, 907-08 (Iowa 1969) (holding government's incorrect assertion regarding cattle had amounted to misrepresentation, which was covered by this exemption).

[513] *See* Rey v. United States, 484 F.2d 45, 48 (5th Cir. 1973) (ruling that misrepresentation claims, although stated in terms of negligence, were still barred by exemption); *Hubbard*, 163 N.W.2d at 907-08 (same).

The scope of damages covered by the quarantine exemption was ably demonstrated in the Fifth Circuit decision of *Rey v. United States*.[515] Interpreting the Federal Tort Claims Act's quarantine exemption,[516] the *Rey* court stated that the government could not be held liable for damages caused by the imposition of a quarantine which, although later proven to be unnecessary, nevertheless caused the plaintiff hog owner to sell his stock at a greatly reduced rate.[517] The court rejected the plaintiff's argument that his cause of action really involved negligent diagnosis instead of negligent quarantine.[518] Instead, the court stated that negligent procedures, including testing and diagnosis, that lead to an unnecessary quarantine, were the kind of acts intended to be barred by the exemption.[519] However, the court added that while the quarantine exemption applied to bar damages for loss of value of negligently quarantined livestock as well as all losses caused by the imposition of a quarantine that resulted in the forced exposure of healthy animals to unhealthy ones, the exemption did not bar damages incidental to a negligently imposed quarantine, such as damage caused by the negligent operation of a motor vehicle during the quarantine inspection process.[520]

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[514] *See* Hall v. United States, 274 F.2d 69, 71 (10th Cir. 1959) (stating that plaintiff's actual cause of complaint was misrepresentation and not negligence, as misrepresentation is exempted under Federal Tort Claims Act).

[515] 484 F.2d 45 (5th Cir. 1973).

[516] 28 U.S.C.A. § 2680(f) (1994).

[517] *Rey*, 484 F.2d at 50.

[518] *Id.* at 48.

[519] *Id.*

[520] *Id.*

(l) Of Any Claimant Who is an Employee of a Governmental Entity and Whose Injury is Covered by the Workers' Compensation Law of This State by Benefits Furnished by the Governmental Entity by Which He Is Employed

The two key inquiries concerning this exemption are (1) what claimants are barred from suing the government, and (2) which causes of action are barred. Regarding the first issue, suppose a state worker injured a privately-employed individual. Would this individual's third party action for damages against the State be barred by the workers' compensation exemption because he had already recovered workers' compensation benefits from his private employer? Most courts[521] have held that a statute like Mississippi's, which specifies that only claims covered by a *state* workers' compensation act are barred, only bars claims filed by government employees, and not the third party tort claims of privately-employed individuals.[522] Consequently, this exemption only bars actions filed by claimants who have received workers' compensation benefits from the *state*, not those brought by privately-employed plaintiffs.

This proved to be the case in *Jarvis v. City of Stillwater*,[523] where an Oklahoma court held that an employee of a private company who was injured by high voltage wires, negligently maintained by the City, was not barred from recovering tort damages against the city even though he had received compensation benefits from his private employer.[524] Noting that a different result had been reached in other states where their workers' compensation exemption provided that the government was immune from the claims of *any person covered*

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[521] *See, e.g.*, Ingram v. State, 786 P.2d 77, 79 (Okla. 1990) (holding government workers' compensation exemption only bars claims filed by government employees); Huff v. State, 764 P.2d 183, 186-87 (Okla. 1988) (holding legislative consideration clearly evinces intent to keep class of exempted claims confined to those made by State's and political subdivisions' own employees).

[522] *See* OKLA. STAT. ANN. tit. 51, § 155(14) (West 1988) (providing that government should not be liable for losses resulting from "any claim covered by any workers' compensation act. . . .").

[523] 669 P.2d 1108 (Okla. 1983).

[524] *Jarvis*, 669 P.2d at 1111.

by a workers' compensation act,[525] the court declared that the Oklahoma exemption, as worded, did not provide the government with any new defense against a non-governmental employee, and hence, did not bar a privately employed person's third party action against the State.[526]

As for the second issue regarding which type of *actions* are barred, actions held by other state courts to be barred by a state tort claims act workers' compensation exemption include: an action based upon a governmental worker's injury on the job,[527] a deceased inmate's mother's wrongful death claim for an injury to her son while working on a road crew, where the inmate's estate had already recovered compensation benefits because of a special inmate employment statute,[528] an injured worker's husband's action for loss of consortium,[529] and a wrongful death claim by a government employee's estate, alleging that the employee was killed by another state employee.[530] In contrast, those actions not barred by a workers' compensation exemption include a retaliatory discharge claim alleging that the plaintiff was fired for claiming workers' compensation benefits,[531] and a claim for breach of contract arising out of the death of an employee covered by the Workers' Compensation Act.[532]

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[525] *See, e.g.,* McCarty v. Village of Nashwauk, 175 N.W.2d 144, 147 (Minn. 1970) (holding village was immune when school teacher fell on sidewalk and received injuries while escorting students); Granato v. City of Portland, 485 P.2d 1115, 1116-17 (Or. Ct. App. 1971) (holding public body not liable when body's negligence injures person who is engaged in course of his employment for another and is entitled to workers' compensation benefits).

[526] *Jarvis*, 669 P.2d at 1111.

[527] *See* Presson v. Kay County Bd. of Comm'rs, 806 P.2d 88, 90 (Okla. Ct. App. 1991) (holding that worker could not sue for injury under State Tort Claims Act where she was compensated by state Workers' Compensation Commission).

[528] *See* Blackmon v. North Carolina Dep't of Correction, 470 S.E.2d 8, 11-12 (N.C. 1996) (involving inmate who was accidentally killed while working on prison detail).

[529] *See* Johnston v. State, 364 N.W.2d 1, 5-6 (Neb. 1985) (involving injury to state employee when she drank coffee urn cleaner in state cafeteria which she thought to be coffee).

[530] *See* Hamlin v. Transcon Lines, 697 P.2d 606, 611 (Wyo. 1985) (holding estate of employee unable to recover from state on theory of respondeat superior that state was liable for co-employee's negligence because exemption made state immune regardless of who brought cause of action).

[531] *See Presson*, 806 P.2d at 90-91 (holding that retaliatory discharge claim was

(m) Of Any Claimant Who at the Time the Claim Arises is an Inmate of Any Detention Center, Jail, Workhouse, Penal Farm, Penitentiary or Other Such Institution, Regardless of Whether Such Claimant is or is Not an Inmate of Any Detention Center, Jail, Workhouse, Penal Farm, Penitentiary or Other Such Institution When the Claim is Filed

Although this exemption appears to be self-explanatory, language in a recent Mississippi Supreme Court decision makes its scope somewhat uncertain. In *Sparks v. Kim*,[533] the court ruled that the inmate exemption, subsection (m), did not apply to a claim alleging the wrongful death of an inmate in a 1991 incident because the Governmental Immunity Act and its exemptions were not in effect in 1991.[534] However, the court added that subsequent to that exemption's passage in 1993, that subsection's exemption would "effectively cut[ ] off a prison inmate's right to bring a negligence or wrongful death action against the State or its employees . . . ."[535] As this exemption's language only purports to bar the actions of any claimant who, at the time that the claim arose, is an inmate, one must wonder if the *Kim* decision does indeed bar wrongful death actions even though wrongful death actions are brought by a relative of an inmate, and not one who, at the time the claim arose, was an inmate. Is the wrongful death-barring language in *Kim* controlling or merely dicta? The answer to this question may only be provided by a later pronouncement by the Mississippi Supreme Court. However, other state courts interpreting similar exemptions have determined that such provisions immunize public entities for suits filed by regularly

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defeated by neither discretionary nor workers' compensation exemption).

[532] *Hamlin*, 697 P.2d at 616-17 (holding that neither state constitution nor state workers' compensation statute denied plaintiff ability to sue state under statutory-indemnity contract).

[533] 701 So. 2d 1113 (Miss. 1997).

[534] *Sparks*, 701 So. 2d at 1114-15.

[535] *Id.* at 1114.

housed inmates of a state penitentiary, as well as actions filed by inmates involved in special work programs,[536] and those by inmates or arrestees in other facilities, such as a city or county jail,[537] or a state-owned group foster home.[538]

(n) Arising out of Any Work Performed by a Person Convicted of a Crime When the Work is Performed Pursuant to Any Sentence or Order of Any Court or Pursuant to Laws of the State of Mississippi Authorizing or Requiring Such Work

Other state courts that have applied exemptions similar to subsection (n) have found that they bar claims by inmates serving in work release programs[539] or while on any work detail during incarceration.[540] The "convicted of a crime" language of Mississippi's exemption suggests that it may also apply to a probationer performing work ordered by any court of law. The dissent in *Hord v. City of Yazoo City* also suggests that subsection (n) immunizes the government from damages for negligent acts and omissions suffered by inmates working on joint state and county work programs authorized by § 47-5-

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[536] *See* Hord v. City of Yazoo City, 702 So. 2d 121, 124-25 (Miss. 1997) (Smith, J., dissenting) (stating inmate in work program barred from bringing negligence claim against government entity).

[537] *See* Reed v. County of Santa Cruz, 44 Cal. Rptr. 2d 149, 151-54 (Cal. Dist. Ct. App. 1995) (holding arrestee in county jail "prisoner" for purposes of this kind of exemption); Freeman v. Jackson County Sheriff's Dep't, 97-CA-00119-COA (Miss. Ct. App. Jan. 8, 1998) (holding that deputies' alleged use of excessive force constituted acts immunized by inmate exception, even though their detention in county jail was brief).

[538] *See* Jiminez v. County of Santa Cruz, 116 Cal. Rptr. 878, 879 (Cal. Dist. Ct. App. 1974) (holding "prisoner" includes ward of juvenile court placed in foster home); Doe v. New Jersey Div. of Youth and Family Serv., 429 A.2d 596, 599 (N.J. Super. Ct. App. Div. 1981), *rev'd*, 445 A.2d 1148 (N.J. 1982) (holding juvenile who was raped in group foster home qualified as "prisoner" for exemption purposes because he had been deprived of his liberty by process of law).

[539] *See* Horton v. State, 915 P.2d 352, 354 (Okla. 1996) (holding State not liable for inmate's injury on work release program where inmate injured by Department of Tourism's negligent driver).

[540] *See* Purvey v. State, 905 P.2d 770, 771 (Okla. 1995) (holding inmate work exemption barred inmate's suit for injury while participating in inmate work detail).

451 of the Mississippi Code Annotated.[541]

(o) Under Circumstances Where Liability Has Been or is Hereafter Assumed by the United States, to the Extent of Such Assumption of Liability, Including but Not Limited to Any Claim Based on Activities of the Mississippi National Guard When Such Claim is Cognizable Under the National Guard Tort Claims Act of the United States, or When Such Claim Accrues as a Result of Active Federal Service or State Service at the Call of the Governor for Quelling Riots and Civil Disturbances

This subsection immunizes Mississippi governmental entities from liability for the negligent acts of the Mississippi National Guard for which the federal government assumes liability. However, this exemption's immunization of Mississippi entities from any liability that the federal government *assumes* does not create any new liability for state or local entities where the federal government *does not assume* liability.

This issue was considered in the California decision of *Chester v. State*,[542] where the plaintiff alleged that the California National Guard exemption,[543] which immunized the State from liability for any acts of the National Guard that would be "compensated pursuant to the Federal Tort Claims Act,"[544] created public entity liability for any tort committed by the National Guard that *was not* compensated by the Federal Tort Claims Act.[545] Rejecting the plaintiff's argument, the court held that the Legislature *could have* created such a liability by stating that the public entity was liable for any act not covered by the FTCA, but it obviously *chose not* to do so.[546] Instead, the court reasoned that the Legislature showed its true intentions by precluding "an existing state remedy where a federal remedy was already available."[547] The Legislature's purpose was to curb liability, the court concluded, not extend it.[548] So too, one may assume that the Mississippi Legislature did not intend to create any new state liability by adopting this exemption. The Legislature was merely dispensing with a remedy that had always been available, but which was nevertheless barred where the federal government chose to provide a remedy on its own.

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[541] *Hord*, 702 So. 2d at 124 (Smith, J., dissenting).

[542] 26 Cal. Rptr. 2d 575 (Cal. Dist. Ct. App. 1994).

[543] CAL. GOV'T CODE § 816 (West 1995).

[544] CAL. GOV'T CODE § 816.

[545] *Chester*, 26 Cal. Rptr. 2d at 578.

[546] *Id.* at 579.

The second aspect of this exemption immunizes the acts of governmental employees called by the Governor to quell riots and civil disturbances.[549] Other courts have held that similar exemptions apply to Army Reserve National Guardsmen called out by the Governor[550] to quell a riot. However, the State has the burden of proving that the employee was actually called into emergency service.[551] For example, in an Oklahoma case where the government claimed immunity based upon an emergency service exemption, the court ruled that the State could not prove that the military employee who went berserk and shot the plaintiff and others, was specifically responding to the Governor's emergency call, and denied the application of the exemption to the shooter's actions.[552]

(p) Arising out of Plan or Design for Construction or Improvements to Public Property, Including But Not Limited to, Public Buildings, Highways, Roads, Streets, Bridges, Levees, Dikes, Dams, Impoundments, Drainage Channels, Diversion Channels, Harbors, Ports, Wharfs or Docks, Where such Plan or Design Has Been Approved in Advance of the

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[547] *Id.*

[548] *Id.*

[549] MISS. CODE ANN. § 11-46-9(1)(o) (1998).

[550] *See* Baca v. State, 810 P.2d 720, 722-23 (Idaho 1991) (requiring guardsmen to prove they had been called into active service to take advantage of exemption, even though situation had been declared state emergency).

[551] *Baca*, 810 P.2d at 722.

[552] *See* McFadden v. State, 542 So. 2d 871, 875 (Miss. 1989) (discussing lack of resources immunity claimed by defendant); Ingram v. State, 786 P.2d 77, 79-80 (Okla. 1990) (stating National Guard must prove that its actions were part of official guard activities to benefit from guard exemption).

Construction or Improvement by the Legislative Body or Governing Authority of a Governmental Entity or by Some Other Body or Administrative Agency, Exercising Discretion by Authority to Give Such Approval, and Where Such Plan or Design is in Conformity With Engineering or Design Standards in Effect at the Time of Preparation of the Plan or Design

The "approval of plans or designs is peculiarly a function of the executive or legislative branch of government,"[553] and many legislatures have established design exemptions to avoid a jury's "reweighing the same factors considered by the governmental entity which approved the design."[554] As drafted by the Mississippi Legislature, Mississippi's design exemption features three phrases which lend themselves to extensive judicial scrutiny. Those are (1) the causality between the plaintiff's injury and the plan or design, (2) advance approval of the plan or design, and (3) conformity of the design with applicable standards.[555] Each of these will be considered in turn, in light of decisions in other states where legislatures have drafted similar design exemptions.

(i) Causality Between Plan or Design for Construction or Improvements and Injury

A governmental entity is immune for all harms that result from its plan or design of a building, highway, or other structure so long as the government can show that the plan for construction or improvements was approved in advance by its governing authority, and that the plan or design was in conformity with applicable standards in effect at the time the plan or design was devised.[556] However, before the government may claim design immunity, it must first show a causal relationship between the plan or design and the claimant's injury. In other words, if an element of the plan or design did not cause the injury, then this exemption does not immunize the government from liability.

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[553] *See* N.J. STAT. ANN. § 59:4-6 cmt. (West 1992) (discussing New Jersey's design exemption).

[554] Cameron v. State, 497 P.2d 777, 782 (Cal. 1972) (discussing design decision by board of supervisors regarding "S" curve in road).

[555] MISS. CODE ANN. § 11-46-9(1)(p) (1998).

[556] MISS. CODE ANN. § 11-46-9(1)(p).

New Jersey's design exemption[557] is very similar[558] to Mississippi's, and the New Jersey courts have given it sufficient interpretation to provide a useful guide for fathoming the scope of Mississippi's exemption.[559]

As for causality, a New Jersey court has held that an action alleging negligent design of a sewage treatment plant is defeated by a design exemption if the plant was constructed according to a permit; however, where it was not constructed according to permit, the entity is not immune.[560] Other state courts have ruled that where an entity cannot show causality, the design exemption has no application. For example, one court, noting that a design exemption immunizes a city from a pedestrian's slip and fall action where engineering drawings provided for the particular position of a manhole, if the drawings did not so provide, the design exemption does not immunize the city for a pedestrian's injury.[561] Yet another court held that where a highway design evinced consideration of centerline elevations, but failed to indicate that the degree of "S" curve banking was considered in the original design, the design exemption did not defeat a plaintiff's dangerous curve allegation.[562]

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[557] N.J. STAT. ANN. § 59:4-6 (West 1992) (immunizing state "for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance . . . or where such plan or design is prepared in conformity with standards previously so approved").

[558] The New Jersey decisions are particularly helpful to an understanding of the interplay between exemptions pertaining to highways, such as the weather, design, actual or constructive notice, sign removal, and discretionary exemptions, all of which New Jersey has in common with Mississippi's subsections (q), (p), (v), (w), and (d), respectively. In many of their automobile accident cases involving public entities, the New Jersey courts consider several of these exemptions and state why each of them does or does not immunize the public body from liability.

[559] *See, e.g.*, Ciambrone v. State Dep't of Transp., 558 A.2d 47, 51 (N.J. Super. Ct. App. Div. 1989) (holding Department of Transportation's decision on timing and sequence of traffic light was planning level or design decision); Costa v. Josey, 388 A.2d 1019, 1025 (N.J. Super. Ct. App. Div. 1978) (holding Tort Claims Act which provides immunity for public entity for injury caused by plan or design of public property was intended to grant complete as well as perpetual immunity).

[560] Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes, 449 A.2d 472, 480-81 (N.J. 1982).

[561] Allstate Ins. Co. v. Metropolitan Sewerage Comm'n, 258 N.W.2d 148, 150-51 (Wis. 1977).

The second step in proving causality is demonstrating that the injury-causing agent was a part of the original plan or design. The New Jersey Supreme Court, in *Thompson v. Newark Housing Authority*,[563] upheld a plaintiff's claim that a housing authority's non-inclusion of smoke detectors created a dangerous condition—in a high rise apartment building which later burned, resulting in a five-year old child's death. The court rejected the State's argument of immunity by virtue of the design exception, declaring that the State did not prove that the dangerous condition—the lack of smoke detectors—had been a part of the original plan or design.[564] The court decided that

> for "plan or design" immunity to attach, the public entity must establish that an approved feature of the plan sufficiently addressed the condition that is causally related to the accident. The absence of the feature simply does not demonstrate the kind of approval by a . . . [government branch that] should not be second-guessed by the judiciary.[565]

Elaborating upon the proof necessary to show plan feature consideration, the court opined that the government need not show that a feature of the plan, such as smoke detectors, "was specifically considered and rejected."[566] All that is required to preempt judicial inquiry, the court noted, was proof that the plans "sufficiently embrace the condition that is the subject matter of plaintiff's claim . . . ," i.e., a consideration of fire dangers, and how best to deal with them.[567] The court concluded that since the engineers did not consider any manner of fire prevention plan, the lack of detectors could not be said to have been part of the original plan or design.[568]

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[562] Cameron v. State, 497 P.2d 777, 784-85 (Cal. 1972). *See* Don F. Vaccaro, Annotation, *Liability of Governmental Entity of Public Officer for Personal Injury or Damages Arising Out of Vehicular Accident Due to Negligent or Defective Design of a Highway*, 45 A.L.R. 3d 875 (1972) (discussing these issues at length).

[563] 531 A.2d 734 (N.J. 1987).

[564] *Thompson*, 531 A.2d at 740-41.

[565] *Id.* at 740.

[566] *Id.*

(ii) Plan or Design Approved in Advance

The second aspect of the design exemption is whether the plan or design was approved in advance by the appropriate governmental entity or agency. If any plan or design was properly approved, this exemption applies regardless of how shortsighted the plan might have been. But if the design or plan was not pre-approved by the proper authority, then the exemption has no application, regardless of how well-conceived it may have been.[569] Said another way, there is no second-guessing an original design when the particular feature causing the injury is an "approved feature of the plan."[570] Or, as the New Jersey courts have said, "plan or design immunity does not depend upon any showing of the reasonableness of the design, nor can it be lost by changed circumstances. . . . [I]mmunity from liability . . . is afforded in the first instance only for an approved feature of the plan or design."[571] In short, approval by the proper authority makes any design, good or bad, unreviewable by the courts.

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[567] *Id.*

[568] *Id.* at 740-41. The proof required to show causality between an element of a road design and an injury is not always easy to establish. *Id.* In a New Jersey case, the court ruled that an engineer's affidavit, rendering his opinion as to which matters were contemplated when a road was designed twenty years earlier, was insufficient to justify acceptance of his statement as fact for the purpose of summary judgment, especially in the absence of cross-examination. Costa v. Josey, 415 A.2d 337, 339 (N.J. 1980).

[569] *See* Kolitch v. Lindedahl, 497 A.2d 183, 189 (N.J. 1985) (holding that no matter how dangerous "sag curve" may have been, since it was part of design approved by State, State was immune insofar as plaintiff alleged that curve's design created dangerous condition).

[570] *Thompson*, 531 A.2d at 739.

[571] Birchwood Lakes Colony Club v. Borough of Medford Lakes, 449 A.2d 472, 481 (N.J. 1982) (citation omitted).

Proof of approval must come from the agency responsible for the design. In Mississippi, this is usually a county or municipal engineering division, or the Mississippi Department of Transportation. Wherever approval comes from, it must ultimately be proved in court, or the design exemption will avail the government naught. An excellent example of this maxim is found in *Bingham v. Idaho Department of Transportation*,[572] where an Idaho court ruled summary judgment was inappropriate to relieve the State of liability for the negligent design of a roadway by virtue of the Tort Claims Act's design exemption.[573] The court so held because the State had offered no proof that "the plan and design had been approved in advance" by the proper authority.[574]

It should also be noted that when one speaks of an original plan and design, one only contemplates construction and improvement, not subsequent routine maintenance.[575] In other words, where the government designs plans for construction of a roadway or building, or makes plans to improve its property, and those plans are approved and are in accordance with appropriate standards, the government is immune from liability no matter the ultimate result. But where a public entity engages in routine maintenance of its property, e.g., blacktopping a roadway, filling in street holes, or patching the wall of a government-designed building, the design exemption is inapplicable to that subsequent maintenance.

This rule of law was ably demonstrated in *Costa v. Josey*, where a New Jersey court declared that if the initial design of a roadway contemplated that a concrete lane divider would be lowered by subsequent resurfacing, then the State could not be held liable for the divider's later reduction in size and the resultant automobile collision for lack of a visible road divider.[576] However, if the plan did not contemplate such a reduction, the court said, and the divider's height was reduced by routine blacktopping maintenance, then the State could be held liable for negligent maintenance and the design immunity would afford it no immunization against liability.[577]

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[572] 786 P.2d 538 (Idaho 1989).

[573] *Bingham*, 786 P.2d at 540-41. Idaho's design exemption is almost identical to Mississippi's subsection (p). IDAHO CODE § 6-904(7) (1998).

[574] *Bingham*, 786 P.2d at 541 (holding that lower court's failure to require any such proof warranted reversal).

[575] *See* Daniel v. State Dep't of Transp., 571 A.2d 1329, 1347-48 (N.J. Super. Ct. App. Div. 1990) (holding State was not immune for design construction or improvement).

(iii) Plan or Design in Conformity With Standards at Time of Preparation

Whether a design conforms to an appropriate standard has also been a hotly contested issue. In *Rodgers v. Passaic Housing Authority*,[578] the plaintiff alleged faulty design of piping in a housing authority-designed apartment complex, and the housing authority offered proof that the piping design had been prepared in conformity with standards approved by federal, state, and local authorities, none of which required that the piping be insulated to prevent burning when touched.[579] The New Jersey Superior Court ruled that the Authority was immune from liability for injuries suffered by an infant burned by touching the pipe, since it had made a "decision to leave the insulation off the pipes pursuant to the federal standard . . . ."[580]

What happens when no standards exist? Is the government free to create any design, no matter how foolish, where no state or federal standards are in place? In *Daniels v. Department of Transportation*,[581] the Georgia Court of Appeals first answered this question in the affirmative regarding Georgia's design exemption.[582] In support of its Motion for Summary Judgment, the DOT offered the affidavit of a transportation engineer who stated that at the time the intersection was designed, there existed no published guidelines relative to intersection design, so the intersection could not have violated any national standards.[583] The DOT engineer also testified that the design was one common to Georgia intersections at the time.[584] Although the plaintiff countered with an affidavit by an expert that the intersection design was not in conformity with the generally accepted design standards of the day, the court rejected that expert's testimony because his opinion was based upon a document containing standards which had not been approved by the federal government until seven months *after* the intersection in question had been designed.[585] Consequently, the court concluded that the plaintiff's expert's opinion would be excluded from evidence, and the DOT would be granted summary judgment based upon the design exemption.[586]

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[576] 415 A.2d 337 (N.J. 1980).

[577] *Costa*, 415 A.2d at 340.

[578] 354 A.2d 681 (N.J. Super. Ct. App. Div. 1976).

[579] *Rodgers*, 354 A.2d at 682.

[580] *Id.*

[581] 474 S.E.2d 26 (Ga. Ct. App. 1996).

[582] *Daniels*, 474 S.E.2d at 27 (citing GA. CODE ANN. § 50-21-24(10) (1998)).

However, Georgia's appellate courts have also ruled that despite the non-existence of standards upon which the government could base its roadway design or plan, plaintiffs could nevertheless prove that the government did not meet generally accepted design standards via the use of expert testimony. In *Georgia Department of Transportation v. Brown*,[587] the court held the State liable for its decision to open a road prior to completion with an alternative traffic control system that relied on two-way stop signs, rather than four-way traffic signals.[588] The court reasoned that in so doing, the DOT deviated from "generally accepted engineering and design standards" which called for four-way signals at similar intersections.[589] Rejecting the State's argument that it could not be held liable for faulty design where there were no existing design standards applicable to the intersection, the court based its decision on the testimony of the plaintiff's expert witness, who asserted that the DOT's deviations from accepted standards consisted of

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[583] *Daniels*, 474 S.E.2d at 27.
[584] *Id.*
[585] *Id.*
[586] *Id.* at 27-28.
[587] 460 S.E.2d 812 (Ga. Ct. App. 1995), *aff'd*, 471 S.E.2d 849 (Ga. 1996).
[588] *Brown*, 460 S.E.2d at 816.
[589] *Id.* at 815.

> failing to conduct additional engineering studies assessing the feasibility of opening the road with stop signs rather than the traffic light signals . . . ; failing to establish a transition period from an all-way stop to a two-way stop; and failing to monitor the intersection in view of the change in plans to determine whether the modification was acceptable.[590]

In light of the *Brown* rationale, it appears that the absence of design standards is not an absolute license for public entities to design intersections, roadways, or buildings with no concern for public safety. General, unwritten design standards and common sense must be taken into consideration in the absence of standards etched in stone.

Another key standards issue is that of the government's failure to conform to *changing* design standards. In other words, if a highway was designed in accordance with the engineering standards of 1940, but recent changes in traffic, updates in intersection design, or physical changes to the roadway itself have rendered the original design obsolete and dangerous, does the design immunity still protect the government when it fails to update its roadway design?

In the landmark decision of *Baldwin v. State*,[591] the California Supreme Court noted that when an intersection was designed in the 1940's, there was not sufficient traffic to warrant a left-hand turning lane, but an increase in traffic rendered the intersection dangerous for lack of a left turn lane.[592] Rejecting the State's argument that the design exemption[593] barred the plaintiff's action for negligent design of the intersection, the court ruled that where a dangerous condition arises, albeit through no fault of the State, the State is nonetheless required to redesign the dangerous condition in order to take advantage of the design exemption.[594] As the *Baldwin* court stated, "the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan" or the changing condition of the land.[595]

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[590] *Id.*

[591] 491 P.2d 1121 (Cal. 1972).

[592] *Baldwin*, 491 P.2d at 1123-24.

[593] CAL. GOV'T CODE § 830.6 (West 1995).

[594] *Baldwin*, 491 P.2d at 1127-28.

New Jersey courts have rejected the California rationale,[596] holding original designs or plans to be perpetual and declaring that governmental immunity attaches to original designs and remains forever, even though a dangerous condition later arises.[597] However, the New Jersey rule does not immunize the State for a new hazardous condition created by the State, where, for example, negligent black topping covers up a dividing barrier between two lanes, resulting in an automobile collision. In such cases, the New Jersey courts have ruled that the State loses its otherwise perpetual design immunity.[598]

The California rule has been adopted by South Carolina, as that state's courts have ruled that the immunity provided by the South Carolina design exemption[599] is not "perpetual."[600] In South Carolina, where the governmental entity has actual or constructive notice that the original plan or design has changed and produced a dangerous condition, "the entity will not be shielded from a failure to take corrective action."[601] Conceding that the mere passage of time is not sufficient to constitute a change in conditions, the South Carolina courts have nevertheless held that actual knowledge of changed physical conditions representing a danger to the public will forfeit the governmental entity's once-held design exemption immunity.[602]

Conversely, Georgia opted for the New Jersey rule, where its courts have exempted the State from liability for its failure to upgrade highways to meet changing design standards. In

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[595] *Id.* at 1127.

[596] *See* Costa v. Josey, 415 A.2d 337, 339 n.1 (N.J. 1980) (noting New Jersey Legislature explicitly rejected California's interpretation of design exemption).

[597] *Id; see also* Willer v. City of Thornton, 817 P.2d 514, 518 (Colo. 1991) (holding governmental design immunity to be perpetual).

[598] *Costa*, 415 A.2d at 339.

[599] S.C. CODE ANN. § 15-78-60(15) (Law Co-op. 1998).

[600] Wooten v. South Carolina Dep't of Transp., 485 S.E.2d 119, 123 (S.C. Ct. App. 1997), *aff'd*, 1998 WL 951235 (S.C. 1999).

[601] *Wooten*, 485 S.E.2d at 123.

[602] *Id.*

Daniels v. Department of Transportation,[603] the Georgia Court of Appeals rejected a plaintiff's allegation that the Department's failure to upgrade an intersection, which resulted in his automobile collision, subjected the State to liability. Noting that the design in question was appropriate in its day, but created a safety hazard according to modern design standards, the court declared that the Legislature's use of the phrase "design standards in effect at the time of preparation of the plan or design"[604] in its design exemption signaled legislative intent to "include protection for [the State's] failure to upgrade a highway to meet current design standards."[605]

Mississippi's design exemption is similar to Georgia's insofar as they both address "design standards in effect at the time of preparation of the plan or design." Because South Carolina's exemption excludes this language, it is reasonable to assume that Mississippi's design exemption is of the perpetual variety, immunizing its public bodies for failure to upgrade plans or designs that were originally in conformity with the design standards of their day. However, if a Mississippi entity wishes to claim the protections of subsection (p), it must be prepared to prove by competent evidence that (1) the injury was caused by the design, (2) the design was properly approved, (3) the design met the applicable design standards of its day, and (4) the changed condition was in no way caused by the entity itself.

(q) Arising out of an Injury Caused Solely by the Effect of Weather Conditions on the Use of Streets and Highways

The two phrases relevant to the inquiry of whether the government is immune for icy road conditions caused solely by the weather are (1) what is meant by "solely by the effect of weather," and (2) what is meant by "on the use of streets and highways." In addressing the former question, other state courts uniformly define "solely by the weather" as meaning when the weather, alone, creates the injury-causing condition. For example, when a bridge ices over and motorists collide because of the slippery roadway, the government is immunized by the weather exemption.[606] However, where the injury-causing conditions are created by the government, or where natural weather conditions are worsened by governmental contribution, the exemption is held not to apply.

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[603] 474 S.E.2d 26 (Ga. Ct. App. 1996); *see also* Willer v. City of Thornton, 817 P.2d 514, 517 (Colo. 1991) (adopting perpetual design immunity).

[604] GA. CODE ANN. § 50-21-24(10) (1998).

[605] *Daniels*, 474 S.E.2d at 27-28.

For example, it has been held that where a driveway[607] or ditch[608] contributes to a flooded roadway, the government may not allege rain on the roadway as grounds for immunity via a weather exemption. Similarly, where icy road conditions are caused by the release of water through a flood gate,[609] a break in a water line,[610] or by water spilling off the property of adjacent landowners,[611] the government loses its immunity because these conditions are not created "solely" by the weather. Or, as the Oklahoma appellate court opined in *Holt v. State*:

> If snow, ice or other weather element creates the offending condition without human intervention, the state is exempt. However, even if the snow or ice is of natural origin, but the state acts affirmatively to create a dangerous condition, or exacerbates the natural danger already existing, the state is

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[606] *See* Horan v. State, 514 A.2d 78, 80 (N.J. Super. Ct. App. Div. 1986) (holding that plaintiff must prove government's act helped cause injury in concert with weather in order to defeat weather exemption's protective shield).

[607] *See* McGowan v. Borough of Eatontown, 376 A.2d 1327, 1330 (N.J. Super. Ct. App. Div. 1977) (interpreting New Jersey's weather exemption and stating that public entity is not liable "for an injury caused solely by the effect on the use of streets and highways of weather conditions"); *see also* N.J. STAT. ANN. § 59:4-7 (West 1992).

[608] *See* Meta v. Township of Cherry Hill, 377 A.2d 934, 936-38 (N.J. Super. Ct. App. Div. 1977) (finding city's failure to prevent injury after notification of emergent road conditions constituted jury question regarding State's immunity).

[609] *See* Holt v. State, 927 P.2d 57, 62 (Okla. Ct. App. 1996) (holding State was not entitled to immunity for release of water through flood gate causing icy roads because State failed to sufficiently warn).

[610] *See* Draskowich v. City of Kansas City, 750 P.2d 411, 416-17 (Kan. 1988) (holding city's failure to warn drivers of ice on road after water main broke was sole proximate cause of accident).

[611] *See* Walton v. Ramp, 407 N.E.2d 1189, 1191-92 (Ind. Ct. App. 1980) (disposing of water by adjacent landowner creating ice on road was not condition entitling State to immunity).

not exempt.[612]

However, a public entity's failure to correct or warn of entirely natural icy conditions has been held not to obviate the application of the weather exemption. As the *Horan* court quipped, if such were the case, "the weather immunity statute would, in effect, be written out of the books."[613]

As for what constitutes a "street or highway" upon which bad weather conditions must exist, it was held in *Bligen v. Jersey City Housing Authority* that "common sense" dictates that a private driveway is not a street or highway as contemplated by a weather exemption statute.[614] Where the plaintiff fell on an interior driveway of a public parking lot and not on the street, due to natural icy conditions, the *Bligen* court concluded that the State had no immunity by virtue of the weather exemption which only applies to streets and highways.[615]

(r) Arising out of the Lack of Adequate Personnel or Facilities at a State Hospital or State Corrections Facility if Reasonable Use of Available Appropriations Has Been Made to Provide Such Personnel or Facilities

This resource allocation exemption was cited by the Mississippi Supreme Court in *State v. Hinds County Board of Supervisors*,[616] in support of exempting the State from liability for passing a statute which provided a mere ten dollars per day per inmate reimbursement to the county for housing state prisoners.[617] Although the court cited this exemption along with three others in order to include any exemptions which might apply to the facts of the *Hinds County Board of Supervisors* case, the exemption which probably had more application to the facts of that case was subsection (g), which immunizes the *decision to seek* adequate personnel or resources. Indeed, the distinction between subsection (g) and (r) is a significant one and constitutes more than a question of mere semantics.

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[612] *Holt*, 927 P.2d at 61.

[613] Horan v. State, 514 A.2d 78, 79 (N.J. Super. Ct. App. Div. 1986). The court stated that if the weather does not create a dangerous situation, there exists nothing with which to charge the government. *Horan*, 514 A.2d at 79.

[614] *See* Bligen v. Jersey City Hous. Auth., 592 A.2d 623, 625 (N.J. Super. Ct. App. Div. 1991), *aff'd*, 619 A.2d 575 (N.J. 1993) (interpreting New Jersey weather exemption within definition of what constitutes "streets" under Municipal Land Use Law); *see also* N.J. STAT. ANN. § 59:4-7 (West 1992) (codifying New Jersey's weather exemption).

[615] *Bligen*, 592 A.2d at 625.

[616] 635 So. 2d 839, 842 (Miss. 1994).

[617] *Hinds County Bd. of Supervisors*, 635 So. 2d at 841.

This distinction was discussed in a New Jersey case, *Lopez v. City of Elizabeth*,[618] in which a pedestrian sued a city after she stepped into a pothole. The City raised the resource allocation exemption[619] defense, offering testimony that the City had funds sufficient to hire only one Public Works Inspector.[620] After deciding the case on matters unrelated to Mississippi's subsection exemption schemes, the court initiated a discussion of the difference between the exemption concerning the decision to seek adequate personnel or resources (corresponding to Mississippi's (g)) and the resource allocation exemption (similar to Mississippi's subsection (r)) by stating that the resource seeking exemption

> typically involves decisions whether or not to hire people or procure material or equipment. Such decisions are made at a relatively high level of government and have been traditionally free of tort liability. The latter are lower level operational decisions how to deploy resources that are on hand. [The decision] to hire another pothole inspector is . . . [a seek resources exemption] decision. Whether to have him first inspect the north side or the south side of town is a . . . [resource allocation exemption] decision.[621]

In other words, the resource-seeking exemption, Mississippi's subsection (g), immunizes the decision whether or not to hire or purchase, while the resource allocation exemption, our subsection (r), immunizes only decisions concerning how to utilize available personnel or resources.[622]

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[618] 584 A.2d 825 (N.J. Super. Ct. App. Div. 1991).

[619] *See* N.J. STAT. ANN. § 59:2-3(c) (West 1992) (failing to restrict itself to state hospitals or prisons, but is otherwise similar to Mississippi's resource allocation exemption (r)).

[620] *Lopez*, 584 A.2d at 827.

[621] *Id.*

The two preconditions to the immunization of subsection (r) are that the resource allocation must take place at a state hospital or corrections facility, and that reasonable use of available funds has already been utilized with regard to obtaining personnel and equipment, prior to making the resource allocation judgment in question. While proof of the first condition may be easy to make, proof of the second may not be so simple.

"Reasonable use of appropriations" language also appears in a Minnesota Tort Claims Act exemption immunizing the "usual care and treatment" of state corrections hospital inmates where "reasonable use of available appropriations has been made. . . ."[623] Applying that exemption, a Minnesota court found that a mentally ill patient who suffered injuries in a jump out of a third floor window of a psychiatric unit, and subsequently alleged inadequate supervision and inadequate supervisory nursing personnel, had pleaded allegations sufficient to defeat a motion for summary judgment based upon the allocation of personnel subsequent to reasonable use of appropriations.[624] In other words, where the plaintiff alleged that reasonable use of appropriations had not been made, the State then had the burden of coming forward and making that proof, and because of the government's failure to do so, the court found summary judgment in favor of the State to be inappropriate.[625]

Proof of reasonable use of appropriations, as the New Jersey courts have observed, should include some testimony indicating that the government did not correct the injury-causing problem because it had decided to solve another problem instead.[626] New Jersey courts have also suggested that where a particularly dangerous situation or condition has developed but gone uncorrected, and it results in a plaintiff's injury, the government must prove that it allocated available resources to correct another equally or more dangerous condition, or it will not be allowed to utilize the resource allocation exemption.[627] In other words, for a governmental entity to find protection in this exemption, it must show that it allocated available resources in a reasonable manner, in that the plaintiff's injury occurred because the public entity had allocated resources to solve an equal or more pressing problem than the one which injured the plaintiff.

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[622] *See* Longo v. Santoro, 480 A.2d 934, 940 (N.J. Super. Ct. App. Div. 1984) (holding that principal's decision as to appropriate placement of available supervisory personnel on school grounds was type of decision covered by resource allocation exemption).

[623] MINN. STAT ANN. § 3.736(3)(k) (West 1999).

[624] *See* Diedrich v. State, 393 N.W.2d 677, 682-83 (Minn. Ct. App. 1986) (noting resource allocation exemption does not bar all claims made by hospital inmates).

[625] *Diedrich*, 393 N.W.2d at 679.

(s) Arising out of Loss, Damage or Destruction of Property of a Patient or Inmate of a State Institution

Although this exemption purports to limit its protection to incidents occurring in institutions such as Whitfield, Parchman, and other state facilities, in *Starnes v. City of Vardaman*,[628] the Mississippi Supreme Court implied that this exemption could also apply to a state inmate assigned to a community work detail.[629] How the issue of application of a property damage exemption arose in *Starnes* when an inmate, not his property, was injured, remains unclear. Consequently, only future action by the court will present a clearer picture of this exemption's scope.

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[626] *See* Lopez v. City of Elizabeth, 584 A.2d 825, 831 (N.J. Super. Ct. App. Div. 1991) (finding that where entity raised resource allocation defense to defeat plaintiff's claim for falling into pothole, acceptable proof that government had made reasonable use of appropriations for resources included proof that it had used available monies to repaint road lines instead of filling potholes).

[627] *See Longo*, 480 A.2d at 939 (stating that simply adding dangerous road condition to list of things to repair when funds became available was insufficient resource allocation to claim exemption's protection where government could not show that items given more priority were more critical than road repair which would have prevented plaintiff's injury).

[628] 580 So. 2d 733 (Miss. 1991).

[629] *Starnes*, 580 So. 2d at 737. The court suggested that in a pre-Immunity Act case, the new exemption would cover certain situations once it became effective in 1993. *Id.*

(t) Arising out of Any Loss of Benefits or Compensation Due Under a Program of Public Assistance or Public Welfare

Although this exemption appears to be self-explanatory, two of its terms, "benefits" and "loss," may require significant legal interpretation. South Carolina's Tort Claims Act features a welfare exemption which is similar to Mississippi's subsection (t), and it is the exemption upon which Mississippi's was based.[630] Consequently, the South Carolina Supreme Court's interpretation of that exemption is relevant to an analysis of subsection (t). In *Rice v. School District of Fairfield*, the court was presented with a plaintiff's action for loss of benefits, namely her "loss" of training opportunity "benefits."[631] The plaintiff, a recipient of welfare payments, had voluntarily involved herself in an a public assistance employment program, and had been assigned the non-paid position of school cafeteria server.[632] When rumors spread among the students that she had contracted the AIDS virus, the Department of Social Services transferred her to another work location.[633]

The *Rice* court found that the training she received pursuant to the voluntary work experience program, coupled with the regular welfare checks she received while participating in the program, constituted "benefits or compensation" as contemplated by the exemption.[634] Nevertheless, the court ruled that the exemption had no application to her lawsuit since the second prong of the test warranting application of the exemption, namely that she suffer a loss resulting from the termination or reduction of benefits, may not have been met. She was not terminated from the program, but merely reassigned to another voluntary work location, and she still received the same AFDC checks to which she had been previously entitled.[635] In so deciding, the court denied the State's Motion for Summary Judgment based upon the exemption, declaring that a genuine issue of material fact existed as to whether the plaintiff had suffered a "loss" of benefits, a showing essential to the exemption's application.[636] Accordingly, it may be assumed that for the welfare exemption to apply, a claimant must have suffered a "loss" of compensation or benefits, and that "benefits" will be liberally interpreted to mean anything from welfare payments to a loss of training opportunities offered by a public assistance program.

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[630] S.C. CODE ANN. § 15-78-60(22) (Law Co-op. 1998).

[631] Rice v. School Dist. of Fairfield, 452 S.E.2d 352, 354 (S.C. Ct. App. 1995).

[632] *Rice*, 452 S.E.2d at 353-54.

[633] *Id.* at 354.

[634] *Id.* at 354-55.

(u) Arising out of or Resulting From Riots, Unlawful Assemblies, Unlawful Public Demonstrations, Mob Violence or Civil Disturbances

Historically speaking, as early as 1285 A.D., "the traditional rule had provided for governmental financial liability for property damage caused by a mob."[637] This liability was originally based upon the notion that the members of every community are responsible for the maintenance of the peace and preservation of each other's property rights. This theory ultimately found expression in the ancient "English Riot Act" which created civil liability for community inhabitants to anyone injured in their county by mobs or riots.[638]

The American courts later passed this liability on to local political subdivisions and many legislatures later adopted statutes holding local governments liable for injuries suffered during mob violence and riots.[639] However, most legislatures eventually came to view such statutes as "an anachronism in modern law," as the risks of mob violence are covered by insurance agreements, not local townspeople.[640] Consequently, many governmental immunity acts now contain exemptions immunizing state and local governments from liability for damages caused by mobs and riot-related activities. The purpose of such exemptions has been held by a Texas court to be

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[635] *Id.* at 355.

[636] *Id.* However, the case was dismissed on other grounds. *Id.* at 355-56.

[637] Gates v. Superior Court, 38 Cal. Rptr. 2d 489, 497 (Cal. Ct. App. 1995). The court interpreted California's Tort Claims Act riot exemption, § 845, which, unlike Mississippi's exemption, but similar to many other states' riot exemptions, includes phraseology concerning "police" failure to contain riots or protect against mobs. *Gates*, 38 Cal. Rptr. 2d at 502.

[638] *Id.* at 497.

[639] *Id.*

> (1) to exclude liability for any injuries occurring as a result of police or military efforts to control riots and the like, and (2) to exclude liability for injuries resulting from a government's decision on *how* to control the riot or whether to control it at all. Thus, this [exemption] . . . is quite broad in that it covers all acts by government officers and employees as well as all policy-making decisions.[641]

The riot exemption, the Texas court concluded, was enacted to ease legislative concerns regarding the potential liability of local governments if recovery were allowed against them for riot damages, and to prevent judicial review of governmental decisions on how best to control mobs and riots.[642]

Riot exemptions have also been held to immunize public entities for removing police protection from an area before rioters had dispersed,[643] for failing to disperse an assembled angry crowd,[644] for the neglect of officers to respond to the difficulties of persons living in riot frequented areas,[645] for a delay in summoning the National Guard,[646] for a failure to secure other protection once it was determined the National Guard would be late in arriving,[647] and for the failure of a mayor to avoid a complete breakdown of communication during a riot.[648] On the other hand, it has been held that a riot exemption does not bar a claim for failure to prevent one inmate from starting a fire in his jail cell.[649]

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[640] *Id.* at 498. The court noted that such statutes were no longer necessarily appropriate as the present risk of property loss due to riots is now spread through insurance policy provisions. *Id.* The *Gates* court also held that the riot and police protection exemptions were not overridden by other statutes conferring a right to be free from discriminatory violence. *Id.* at 506.

[641] State v. Terrell, 588 S.W.2d 784, 786-87 (Tex. 1979). The court found that provisions of exemptions were not to limit provisions of other exemptions due to their distinctive qualities, thereby finding exemptions to be read in the disjunctive. *Terrell*, 588 S.W.2d at 788-89.

[642] *Id.* at 787. The court noted that the Legislature felt it necessary to keep the ultimate authority with those government officials by which it was traditionally held. *Id.*

[643] *See* Wong v. City of Miami, 229 So. 2d 659, 662 (Fla. Dist. Ct. App. 1969) (noting that under common law, government had no liability for riot damage and Tort Claims Act did not abrogate common law).

[644] *See* Susman v. City of Los Angeles, 75 Cal. Rptr. 240, 245 (Cal. Dist. Ct. App. 1969).

The key to determining the application of this exemption is the definition given to such terms as "mob violence," "riots," and "civil disturbances." A "riot" has ordinarily been defined as "a tumultuous disturbance of the peace by a group of three or more persons having a common purpose who act in concert to accomplish their purpose through force of violence."[650] "Mob" has been defined as a group of three or more persons brought together by some common political, social, racial, ethnic, or economic issue resulting in reaction or protest.[651] "Civil disobedience" had been held to include "commotions involving a large number of persons acting unlawfully in concert."[652] Consequently, in order for a public entity to benefit from the cloak of immunity granted by the riot exemption, it must prove that the injury-causing disturbance constituted a riot, mob violence, or civil disturbance, and that the damage was in fact caused by one of the rioters or mob members. However, once this proof is made, the entity will not be held liable for any damages caused by the mob or riot, regardless of how negligent or even non-existent its efforts to quell the disturbance may have been.

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[645] *Susman*, 75 Cal. Rptr. at 248-49.

[646] *Id.* at 250.

[647] *Id.* at 251-52.

[648] *Id.* at 252.

[649] Forbus v. City of Denton, 595 S.W.2d 621, 623 (Tex. Civ. App. 1980). The court found that an individual's act of setting fire to one mattress in a jail cell did not qualify as a riot. *Forbus*, 595 S.W.2d at 623.

[650] A & B Auto Stores of Jones St., Inc. v. City of Newark, 256 A.2d 110, 116 (N.J. Super. Ct. Law Div. 1969).

[651] A & B Auto Stores of Jones St., Inc. v. City of Newark, 279 A.2d 693, 699-700 (N.J. 1971).

[652] *See Forbus*, 595 S.W.2d at 623 (interpreting riot exemption of Texas Tort Claims Act); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057 (West 1997) (codifying Texas' riot exemption).

(v) Arising out of an Injury Caused by a Dangerous Condition on Property of the Governmental Entity That Was Not Caused by the Negligent or Other Wrongful Conduct of an Employee of the Governmental Entity or of Which the Governmental Entity Did Not Have Notice, Either Actual or Constructive, and Adequate Opportunity to Protect or Warn Against; Provided, However, That a Governmental Entity Shall Not Be Liable for the Failure to Warn of a Dangerous Condition Which is Obvious to One Exercising Due Care

This exemption was designed to immunize public entities for dangerous conditions on government property *not caused by the fault of a governmental employee*, where the government had no actual or constructive notice of the problem, or if it did, where the condition was so open and obvious that no person exercising due care would be harmed by it. How "dangerous condition," "actual or constructive notice" and "obvious to one exercising due care" are defined is the key to determining this exemption's scope.

"Dangerous condition" has generally been defined as any condition that should be corrected by the governmental unit,[653] and which, because of the condition, endangers the public.[654] This broad definition could include anything from a hole in the ground to a dysfunctional or confusing traffic light.[655] "Constructive notice" has been generally defined as notice "of facts or circumstances which are sufficient to put a prudent person on inquiry as to the existence of the fact with respect to which he is charged with constructive notice,"[656] and as "knowledge of such facts, that the party possessing such knowledge is conclusively presumed to know other things . . . [including] the main fact to which the constructive notice is invoked."[657] With regard to a dangerous condition, "constructive notice" requires "some element of conspicuousness or notoriety so as to put the [government] authorities upon inquiry as to the existence of the defect or condition and its dangerous character."[658]

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[653] *See* City of San Antonio v. Schneider, 787 S.W.2d 459, 468 (Tex. App. 1990) (holding confusing traffic signal to be dangerous "condition" in need of correction).

[654] *See* Sparkman v. Maxwell, 519 S.W.2d 852, 857-58 (Tex. 1975) (showing that red left arrow indicating that motorists should stop was confusing motorists before plaintiff's injury occurred).

[655] *See, e.g., Schneider*, 787 S.W.2d at 468.

[656] Maddern v. City of San Francisco, 169 P.2d 425, 431 (Cal. Dist. Ct. App. 1946).

In *City of Greenville v. Middleton*,[659] a pre-Tort Claims Act case involving issues of common-law "constructive notice," the Mississippi Supreme Court declared that the factors to be considered in determining the existence of constructive notice are "the length of time the defect has existed, the nature or character thereof, the publicity of the place where it exists, the amount of travel over the . . . [area], and any other factors or circumstances in evidence which tend to show notoriety. . . ."[660] Where no such proof is offered by a plaintiff, the court has said that summary judgment in favor of a governmental entity charged with such knowledge is warranted.[661] But in cases where any such proof is offered, even if slight or circumstantial, summary judgment in favor of a defendant is not proper.

For example, in *Drennan v. The Kroger Co.*,[662] a slip and fall case, the court ruled that where the plaintiff proved that the store's roof had water stains above the floor where the fall occurred, and the store manager knew that the roof area leaked during similar rains, the plaintiff met her burden of proof of constructive notice, even though she offered no proof that the area had been traveled by customers that day, and despite the fact that the manager had testified that he inspected the area numerous times on the day of the injury.[663]

As for the term "obvious danger," Mississippi's Court of

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[657] *Maddern*, 169 P.2d at 431.

[658] *Id.*

[659] 86 So. 804 (Miss. 1921).

[660] *Middleton*, 86 So. at 805.

[661] Sanderford v. City of Tupelo, 691 So. 2d 1020 (Miss. 1996).

[662] 672 So. 2d 1168 (Miss. 1996).

[663] *Drennan*, 672 So. 2d at 1171-72.

Appeals considered this phraseology in the unpublished decision in *Barfield v. City of Calhoun City*.[664] In *Barfield,* the plaintiff brought a slip and fall action against a municipality for its alleged negligent maintenance of a street-side pothole. The court first declared that the Supreme Court's decision in *Tharp v. Bunge Corp.*,[665] which minimized the open and obvious defense, was inapplicable to this case, since the *Tharp* decision did not involve a governmental entity, and all such cases are now controlled by § 11-46-9(1)(v) of the Mississippi Code.[666] The court then decided that since the evidence adduced showed that the pothole was eighteen inches wide and two or three inches deep, as a matter of law, the "pothole [was] obvious to someone exercising due care."[667]

May a plaintiff circumvent this exemption by alleging a negligent failure to warn of a danger, rather than the negligent failure to repair upon receiving notice of a dangerous condition? Apparently not, or so the *Barfield* court held when it rejected the plaintiff's argument that the exemption did not apply because her action was based upon the City's failure to warn, not its failure to repair a pothole. The court reasoned that had the City received actual or constructive knowledge of the dangerous pothole condition, it would have been liable for either failure to warn or failure to repair, unless the condition was obvious to a person exercising due care, in which case it would not have been liable for the failure to warn or the failure to repair.[668]

(w) Arising out of the Absence, Condition, Malfunction or Removal by Third Parties of Any Sign, Signal, Warning Device, Illumination Device, Guardrail or Median Barrier, Unless the Absence, Condition, Malfunction or Removal Is Not

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[664] 95-CA-01312-COA (Miss. Nov. 18, 1997). This is an unpublished opinion with no precedential value.

[665] 641 So. 2d 20 (Miss. 1994).

[666] *Barfield*, 95-CA-01312-COA, slip op. at 2-3.

[667] *Id.* at 3.

[668] *Id.* Judge Southwick then concluded by eloquently noting that while "[t]he legislature has the prerogative to adopt this statute . . . [the court has] the obligation to enforce it." *Id.*

Corrected by the Governmental Entity Responsible for its Maintenance Within a Reasonable Time After Actual or Constructive Notice

Upon discovering that Mississippi's counties and its Department of Transportation were experiencing a significant problem with third parties removing stop signs on rural state and county roads,[669] the Legislature passed exemption (w), above. Modeled after the exemptions of South Carolina, Texas, and Oklahoma, this exemption's purpose is to immunize governmental entities for the vandalous acts of third parties where officials had neither discovered the theft nor had a reasonable time to replace a missing sign or device.[670] The passage of this statute affords more specific protection to governmental entities for downed signs[671] and traffic signals[672] than previously afforded by the discretionary exemption. The Oklahoma Court of Appeals stated in *Turner v. Board of County Commissioners*,[673] "the Legislature expressed its intent to protect the governmental entity even where the failure to act would have been ministerial, not discretionary, and ordinarily not exempted."[674] In other words, though the maintenance of a stop sign originally placed at a "T" intersection constitutes a ministerial act not covered by the discretionary exemption, once the sign is pulled down by a third party, and until the government has notice that it has been removed, or has discovered its absence and had sufficient time to replace it, this exemption immunizes the government against liability for any automobile accident caused by the sign's absence.[675]

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[669] The problem first came to my attention while working on a Tunica County car wreck case. During my investigation of a car's headlong crash into a ditch at a "T" intersection occasioned by a missing stop sign, a county engineer informed me that rural and county road stop signs disappeared with great regularity. When asked if any were ever found, he informed me that college students were often the culprits, and that a recent search of dormitory rooms at Mississippi State University had yielded a bountiful harvest of "borrowed" stop signs.

[670] Clearly, this exemption does not apply to the removal of signs by governmental employees. *See* Texas Dep't of Transp. v. Ramming, 861 S.W.2d 460, 465 (Tex. App. 1993) (holding State not entitled to immunity when traffic signal failed during routine maintenance by state employee).

[671] Exemptions like subsection (w) apply to removed signs and signals, not those signs or signals which are in place but not being properly utilized. *See* Holt v. State, 927 P.2d 57, 62 (Okla. Ct. App. 1996) (holding State not entitled to immunity once flashing lights were in place but were not activated when accident occurred).

[672] Robinson v. City of Bartlesville, 700 P.2d 1013, 1015 (Okla. 1985). "[T]he signs, signals and warning devices referred to . . . [in this exemption] are those used in connection with hazards normally connected with the use of roadways and public ways" and not signs found in parking lots. *Robinson*, 700 P.2d at 1015. This exemption does not cover signs or warning devices on motor vehicles, such as a stalled school bus. Singletary v. South Carolina Dep't of Educ., 447 S.E.2d 231, 235-36 (S.C. Ct. App. 1994).

[673] 858 P.2d 1288 (Okla. Ct. App. 1993).

The key issues pertaining to this exemption concern its "actual or constructive notice," "condition," and "reasonable time" language. As for "constructive notice," the analysis of this phrase for purposes of this exemption should be no different than that pertaining to exemption (v). Furthermore, the factors traditionally applied by the Mississippi Supreme Court in its pre-Tort Claims Act cases should have full application to cases falling within the purview of this exemption.[676]

As for "actual notice," several Texas cases interpreting a sign removal exemption almost identical to Mississippi's adequately illustrate what is meant by that phrase. In *Zambory v. City of Dallas*,[677] where a city council member and Department of Transportation employee had both been informed by a citizen that an intersection was dangerous because of a missing traffic signal, the court found that those entities had received sufficient notice to warrant replacing the signal, and their failure to make the correction denied them the protection offered by the absent sign exemption.[678] Other examples of sufficient actual notice include a citizens's discussion about a signal malfunction with agency engineers,[679] and two police officers' notification to a municipal traffic engineer that an intersection signal was confusing drivers and causing near-collisions.[680]

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[674] *Turner*, 858 P.2d at 1290.

[675] *See* Munson v. Missouri-Pac. R.R. Co., 958 P.2d 174, 175-76 (Okla. Ct. App. 1998) (holding county immune for damages occasioned by alleged negligent placement of barriers, where it had no actual or constructive notice that protective measures it had taken were ineffective).

[676] *See* City of Greenville v. Middleton, 86 So. 804, 805 (Miss. 1921) (taking into account length of time defect has existed, nature or character thereof, publicity of place where it exists, and amount of travel over area).

[677] 838 S.W.2d 580, 583 (Tex. App. 1992) (applying Texas' absent sign exemption); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(a)(2) (West 1997) (codifying Texas' absent sign exemption).

Conversely, in *Miller v. City of Fort Worth*,[681] the court ruled that letters from a neighborhood association informing the City that signs were needed in their subdivision did not suffice to put the City on notice for purposes of a fatal collision at a subdivision intersection.[682] The court stated that letters declaring that more stop signs were generally needed throughout the subdivision did not give sufficient notice of the dangerous condition existing at the specific intersection of Glen Meadows Drive and Bellair, where the collision occurred.[683] The court further stated that letters requesting signs at the Glen Meadows/Bellair intersection also failed to put the City on notice for purposes of the exemption because at the time the letters were written, the construction of Glen Meadows Drive had yet to be completed.[684]

If Mississippi's courts apply the rationale utilized in these Texas decisions, they should rule that the actual notice required by this exemption is that which informs the relevant entity of an absent, removed, or dangerously operating sign with sufficient specificity as to leave no doubt about which sign, intersection, or roadway is the subject of the actual notice.[685]

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[678] *Zambory*, 838 S.W.2d at 583.

[679] State v. Norris, 550 S.W.2d 386, 391 (Tex. Civ. App. 1977).

[680] Sparkman v. Maxwell, 519 S.W.2d 852, 858 (Tex. 1975).

[681] 893 S.W.2d 27 (Tex. App. 1994).

[682] *Miller*, 893 S.W.2d at 38. The court found no evidence of notice of a dangerous condition, thereby exempting the government from liability due to immunity. *Id.*

[683] *Id.* at 37-38.

[684] *Id.*

[685] *See also* Chastain v. Clark County Sch. Dist., 866 P.2d 286, 289 (Nev. 1993) (holding that school district's five orders for more sand constituted proof of school's actual notice that schoolyard sandbox had insufficient sand to avoid slip

As to what constitutes a "reasonable time" to correct, no exact definition is available, and this quandary must be solved on a case-by-case basis. However, the Mississippi Supreme Court has consistently held that where notice of a dangerous condition has been given, the person or entity responsible for repair is allowed a reasonable time to correct the problem without answering in damages for any injury caused by the condition. For example, in every case before Mississippi's supreme court in which a store owner promptly acted to correct a dangerous condition brought to his attention, the defendant company has been found to have acted within a "reasonable time" to correct the situation.[686]

Other state courts analyzing this "reasonable time" issue have ruled that three hours is not sufficient time for landowners to remedy an icy condition on their driveway,[687] and that two and a half hours does not constitute a reasonable opportunity for members of an outdoor club to remove ice from the patio of their clubhouse.[688] A New York court has also found that two hours is not a reasonable amount of time for owners of a shopping mall to remedy a patch of ice in their parking lot.[689] However, one court has ruled that eleven days is a reasonable time in which a city engineering department should have remedied a defective traffic signal,[690] while another held

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and fall injuries).

[686] *See, e.g.,* Hardy v. K Mart Corp., 669 So. 2d 34, 39 (Miss. 1996) (holding store not liable absent constructive notice when clerk sent to clean up floor spill as soon as manager was notified of problem); J.C. Penney Co. v. Sumrall, 318 So. 2d 829, 832 (Miss. 1975) (holding store not liable due to swift action when clerk immediately called for janitor upon being advised of vomit on floor of store's foyer, but customer slipped and fell before janitor arrived).

[687] *See* Boyko v. Limowski, 636 N.Y.S.2d 901, 902-03 (N.Y. App. Div. 1996) (using "storm in progress doctrine" to find defendant not liable).

[688] *See* Reynolds v. Masonville Rod & Gun Club, 668 N.Y.S.2d 733, 734 (N.Y. App. Div. 1998) (stating that owner should be afforded reasonable time after cessation of storm or temperature fluctuation to discover and cure hazardous condition).

[689] *See* Baumgartner v. Prudential Ins. Co. of Am., 674 N.Y.S.2d 84, 86 (N.Y. App. Div. 1998) (holding that general awareness of possibly dangerous condition is insufficient to constitute notice of particular condition).

[690] *See* Bady v. Detwiler, 273 P.2d 941, 950-51 (Cal. Dist. Ct. App. 1954).

that a municipality should have remedied a slip and fall condition (occasioned by an overflowing waste water pipe) in less than four or five days.[691]

While "absence," "malfunction," and "removal" are self-explanatory terms, the word "condition" constitutes a more complex concept. Texas courts, interpreting a sign removal exemption almost identical to Mississippi's,[692] have explained that the exemption pertains to signs or warning devices which are "endowed with some condition that should be corrected by the governmental unit"[693] because that condition endangers the public.[694] This endangering condition, which requires correction after notice within a reasonable time in order to invoke the protection of this exemption,[695] has been held by the Texas courts to include: overly confusing traffic signals,[696] tree branches that obstructed motorists' view of a stop sign,[697] the attachment of signs by nails to a barrel,[698] the intended but nevertheless dangerous cycling of a traffic light,[699] and a forty-five miles per hour speed limit sign, which became a dangerous condition after a junior high school was constructed beside it.[700]

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[691] *See* Rowland v. City of Pomona, 186 P.2d 447, 449 (Cal. Dist. Ct. App. 1947) (stating that municipality is presumed to have constructive notice of dangerous condition after it has existed for unreasonable length of time).

[692] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(a)(2).

[693] *See* City of San Antonio v. Schneider, 787 S.W.2d 459, 468 (Tex. App. 1990) (holding that confusing traffic signal is dangerous "condition" in need of correction).

[694] Sparkman v. Maxwell, 519 S.W.2d 852, 857-58 (Tex. 1975). In *Sparkman*, motorists were confused by a red left arrow. *Id.* at 856-57. Prior to plaintiff's injury, police officers reported that some motorists had believed the arrow meant they could turn left instead of stop. *Id.*

[695] *See Schneider*, 787 S.W.2d at 468.

[696] *See Sparkman*, 519 S.W.2d at 856-57; *Schneider*, 787 S.W.2d at 468.

[697] *See* Lorig v. City of Mission, 629 S.W.2d 699, 700-01 (Tex. 1982).

[698] *See* Texas Dep't of Transp. v. Henson, 843 S.W.2d 648, 652 (Tex. App. 1992).

[699] *See* City of Denton v. Mathes, 528 S.W.2d 625, 630 (Tex. Civ. App. 1975).

[700] *See Garza v. State*, 878 S.W.2d 671, 675 (Tex. App. 1994). In *Garza*, the court held that the State's decision to initially place the sign at the site of the accident was discretionary and would thus preclude liability. *Id.* at 674-75. But the court also remanded the case for determination of whether the State waived

The Mississippi Legislature's inclusion in this exemption of the word "condition" along with the words "absence" and "removal" indicates a willingness to require our public entities to correct all signs, guardrails, warning devices, and other "conditions" within a reasonable time after being notified that any of these conditions represents a danger to the public, before those entities may take advantage of this exemption. A public entity's failure to make such corrections will result in its inability to safely rely upon the protections of this exemption.

C. Non-Jury Trial

Section 11-46-13(1) of the Mississippi Governmental Immunity Act provides that "[t]he judge of the appropriate court shall hear and determine, *without a jury*, any suit filed under the provisions of this chapter."[701] This straightforward section has nevertheless generated two key issues, namely, whether the non-jury provision passes constitutional muster and whether the provision applies in special circumstances, such as suits against multiple defendants where at least one is a public entity or cases involving governmental counterclaims. These issues have been addressed by the Mississippi Supreme Court, the Louisiana Supreme Court, and the federal courts interpreting the Federal Tort Claims Act.

1. Is the Act's Non-Jury Provision Constitutional?

This question was most likely answered in the affirmative by the Mississippi Supreme Court in *Wells v. Panola County Board of Education*,[702] a case concerning the non-jury provisions of the former Accident Contingent Fund.[703] Prior to

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sovereign immunity by receiving notice that the sign set an unreasonable speed limit in the area and by failing to correct the condition within a reasonable time. *Id.* at 675-76.

[701] MISS. CODE ANN. § 11-46-13(1) (Supp. 1998) (emphasis added).

[702] 645 So. 2d 883 (Miss. 1994); *see also* Turrentine v. Brookhaven, Miss. Sch. Dist., 794 F. Supp. 620, 623 (S.D. Miss. 1992) (holding Act's non-jury provisions constitutional.)

[703] *Wells*, 645 So. 2d at 885-86.

1993, damage actions against state school districts for the negligent operation of school buses were brought under the purview of the statutes establishing the Fund,[704] which provided for non-jury trials. When a plaintiff challenged those non-jury provisions, the court declared that neither the Mississippi Constitution nor the Seventh Amendment guaranteed a right to a jury trial in an action against the State, because there had never been any common law right to an action against the government.[705] The only action available now, the court said, would be that brought pursuant to a government's waiver of sovereign immunity.[706] And, the court continued, "[w]hen the State does waive sovereign immunity, it may attach any conditions to its consent, such as a provision excluding trial by jury."[707] This reasoning also applies to the non-jury provisions of Mississippi's new Immunity Act, just as it has always applied to the non-jury provisions of the Federal Tort Claims Act.[708]

2. Special Circumstances—Bifurcation or Severance?

Having disposed of the issue of the constitutional right to a jury trial, we must next consider the effect of special circumstances, such as where there are two defendants, one governmental and the other from the private sector, or where the government files an action against a private party who files a counterclaim in response. Other jurisdictions facing these issues have resolved them in one of two ways. They have either severed the defendants' claims and tried two separate cases or bifurcated the trial, trying the case before judge and jury but allowing the judge to rule on the action against the government and the jury to decide the liability of any private sector defendant or counterdefendant.

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[704] MISS. CODE ANN. §§ 37-41-37, 37-41-41 (repealed 1993). Actions against the Fund were foreclosed by the passage of the Governmental Immunity Act, and any pending claims filed against the former Fund were subsumed by the new Act as of April 1, 1993. *See* MISS. CODE ANN. § 11-47-7(1) (Supp. 1998)

[705] *See Wells*, 645 So. 2d at 898-99.

[706] *Id.*

[707] *Id.*

[708] *See, e.g.,* National Iranian Oil Co. v. Ashland Oil, Inc., 716 F. Supp. 268, 270-71 (S.D. Miss. 1989) (holding that no right to jury trial exists for actions brought pursuant to FTCA); Glasspool v. United States, 190 F. Supp. 804, 806-07 (D.Del. 1961) (same).

The Federal Tort Claims Act provides that all actions "shall be tried by the court without a jury."[709] Federal courts have stated that the rationale behind non-jury trials is saving the government money by having more expeditious hearings and dispensing with juries which, when faced with deep-pocketed governmental defendants,[710] might award higher verdicts and make deeper inroads into the public treasury than Congress had intended to allow.[711]

Federal courts interpreting this non-jury provision have required the severance of governmental and private sector defendants and have forbidden joinder of any private sector defendants with the government.[712] They have also held that the government cannot waive its right to a non-jury trial because the provisions of the Federal Tort Claims Act's waiver of immunity are jurisdictional, and the government cannot by consent confer jurisdiction upon the courts to try an action against the government without a jury.[713]

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[709] 28 U.S.C.A. § 2402. This statute was later amended to provide for jury trials in circumstances not relevant to the matters covered in this article. *Id.*

[710] *See* Honeycutt v. United States, 19 F.R.D. 229, 231 (W.D. La. 1956) (stating that juries might "decide cases with their hearts rather than their heads" and holding that mandatory "shall" language of FTCA bars jury of any kind, including advisory jury).

[711] *Id.*

[712] *See* Uarte v. United States, 7 F.R.D. 705, 708-10 (S.D. Cal. 1948) (holding that non-jury statute's language and legislative history clearly indicate that Congress intended that this law should not subject government to joint suits with private defendants, notwithstanding joinder provisions of F.R.C.P.); *see also* Lynn v. United States, 110 F.2d 586, 588-89 (5th Cir. 1940) (stating that separate trial was warranted for private defendant because his liability necessarily depended upon factors different from those establishing government's liability). The courts have held the non-jury prohibition is absolute and is not affected by any other statute, such as the ones that grant agencies the right to "sue and be sued." The granting of an agency's right to "sue and be sued," the courts have determined, does not grant the right to try them before a jury, that right having already been extinguished by the conditions of the government's waiver of immunity. *See* Young v. United States Postal Serv., 869 F.2d 158, 159 (2d Cir. 1989). However, some federal circuits do allow joint actions, with the jury deciding the private defendant's liability and damages, and acting in an advisory capacity only as to the government, the final decision on the government's liability and damages resting solely with the judge. *See, e.g.,* Moloney v. United States, 354 F. Supp. 480, 481-82 (S.D.N.Y. 1972). This procedure, based upon F.R.C.P. 39(c), which provides for advisory juries, is frowned upon by most circuits and even barred by some. *See* Wright v. United States, 80 F.R.D. 478, 479-80 (D.C. Mont. 1978). This proce-

Straightforwardly enforcing the non-jury provision, federal courts have ruled that suits against governmental employees in their official capacities are suits against the government and as such, must be tied without a jury,[714] as must suits against the government seeking to hold it liable for the acts of employees allegedly committed outside the course and scope of employment.[715] Federal courts have also ruled that where the government sues a private defendant, and that defendant brings a counterclaim against the United States, then the government's action may be decided by a jury, but the counter-plaintiff's action against the government must be decided by the court.[716] Two exceptions to the federal non-jury rule appear to be that direct actions filed against national service insurance defendants[717] may be tried by a jury, as well as cases where the government impleads another party for contribution, indemnification, or asserts any other third party claim.[718]

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dure is inapplicable to Mississippi cases because the Mississippi Rules of Civil Procedure contain no provision for advisory jurors.

[713] *See also* Bonn v. Puerto Rico Int'l Airlines, Inc., 518 F.2d 89, 95 (1st Cir. 1975) (stating that government cannot consent to treat jury verdict as anything other than advisory).

[714] *See* Bullion v. Livesay, 83 F.R.D. 291, 292 (E.D. Tenn. 1979) (substituting United States as defendant where employee acted in course and scope of employment); Moffit v. United States, 430 F. Supp. 34, 38 (E.D. Tenn. 1976) (holding that plaintiff's jury demand "lacking in merit").

[715] *See* Concepcion v. United States, 374 F. Supp. 1391, 1394 (D.C. Guam 1974) (applying law of Guam; holding United States not responsible for action of employee outside scope of his employment).

[716] *See* United States v. Rosati, 97 F. Supp. 747, 749 (D.N.J. 1951) (holding that counterclaim was action against United States for purposes of FTCA and consequently required a non-jury trial).

[717] *See* Williams v. United States, 95 F. Supp. 672, 674, (S.D. Tex. 1951) (remanding case for retrial with jury in action against insurance policy defendant). *But see* Burke v. United States, 85 F. Supp. 93, 98 (E.D. Penn. 1948) (holding that where United States was made party defendant along with insurance defendant, no jury could hear case).

[718] *See* Gallardo v. United States, 697 F. Supp. 1243, 1245-47 (E.D.N.Y. 1988)

Louisiana, which has no tort claims act, allows certain common law suits against the State and its political subdivisions (just as certain common law actions against municipalities were allowed in Mississippi prior to the passage of the Governmental Immunity Act). However, § 13:5105 of the Louisiana Revised Statutes, as originally passed, provided that "[n]o suit against the state or a state agency or political subdivision shall be tried by a jury."[719] Louisiana's courts interpreted this statute as providing that actions against both government and private sector defendants may be tried before a jury, but juries may only decide the liability of the private defendant and sit merely in an advisory capacity on governmental liability issues.[720] Although nothing in Louisiana law prohibits a judge from adopting an advisory jury's findings as long as he independently considers the law and evidence first, the preferred procedure is for the judge to make his ruling on governmental liability either while the jury deliberates or contemporaneously with their verdict.[721] Interestingly, Louisiana's courts have established that if the jury's and judge's verdicts are consistent, the standard of review is clearly erroneous, but if their decisions are inconsistent, the standard of appellate review is *de novo*.[722]

The advisory jury option has yielded some "absurd" results, such as where the judge's opinion as to damages recoverable from the government differs greatly from that of the advisory jury's, requiring a *de novo* retrial of the damage issue at the appellate level.[723] Nevertheless, Louisiana continues to apply

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(holding that action against government would be tried by court, while jury could decide merits of government's third party claim); Collins v. General Motors Corp., 101 F.R.D. 4, 7 (W.D. Penn. 1983) (same).

[719] LA. REV. STAT. ANN. § 13:5105(c) (Supp. 1999). This statute was later amended to provide for jury trials upon timely demand in actions against the City of Baton Rouge and the Parish of East Baton Rouge.

[720] *See* Clement v. Griffin, 634 So. 2d 412, 422-23 (La. Ct. App. 1994).

[721] *Id.* Louisiana law provides for a rebuttable presumption of regularity of the lower court's judgment whether rendered by judge or jury. *Id.*

[722] *Id.*

[723] See, for example, *Carr v. City of New Orleans*, 626 So. 2d 374, 377 (La. Ct. App. 1993), where the judge's apportionment of damages between a private defen-

the practice. However, as Mississippi's Rules of Civil Procedure do not provide for an advisory jury, the use of an advisory jury in an Immunity Act case is highly unlikely. I would, however, be remiss in not pointing out that Mississippi courts' utilization of an advisory jury would be, even if ultimately allowed by our Supreme Court, decidedly ill-advised.

Like the federal courts, Louisiana's appellate courts have decided many other issues regarding non-jury trials. Applying their non-jury statute's mandates, Louisiana's courts have decided that the government's right to a non-jury trial is absolute and cannot be waived by the government.[724] This non-jury statute also applies to counter-claims, cross-claims and third party claims filed against the government,[725] and to such claims filed *by* the government while the government's liability is also an issue.[726] However it appears that a governmental entity's insurer is not entitled to a non-jury trial.[727] The only other exception to Louisiana's non-jury rule appears to be when a case against the government proceeds to a jury trial, unobjected to by either party, and then the government, aggrieved by an adverse jury decision, appeals on grounds that it was entitled by law to a bench trial, then the government will be deemed to have waived its absolute right to a non-jury trial.[728]

Although the Mississippi Supreme Court has yet to address these issues, after considering the approaches taken by

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dant and the city differed greatly from the jury's, and the judge's erroneous attempt to reconcile their differences in his opinion necessitated a decision by the supreme court pursuant to *de novo* appeal.

[724] *See* Scott v. Clark, 583 So. 2d 938, 944 (La. Ct. App. 1991) (holding that no constitutional right to jury trial exists in Louisiana civil cases); Descant v. Rapides Parish Police Jury, 409 So. 2d 1226, 1226 (La. Ct. App. 1982) (holding that language of statute clearly prohibits jury trial even if jury trial is requested by government).

[725] *See* Geraci v. Louisiana Dep't of Transp., 589 So. 2d 1215, 1216 (La. Ct. App. 1991).

[726] *See* Leonard v. Parish of Jefferson, 666 So. 2d 1061, 1063 (La. 1996).

[727] *See* McCoy v. Ouachita Parish Police Jury, 564 So. 2d 747, 749 (La. Ct. App. 1990) (holding that governmental co-defendant was entitled to jury trial but governmental insurer was not).

[728] *See* Callahan v. Town of Bunkie, 287 So. 2d 629, 636 (La. Ct. App. 1973).

the federal courts and those in Louisiana, it may be logical to assume that (1) the government's right to a non-jury trial is not waivable; (2) trials involving private sector defendants warrant either severance or trial before a jury, with the judge deciding the government's fate and the jury deciding the private defendant's; (3) counterclaims against public entities should be decided by the court, while the government's counterclaims against private defendants may be decided by a jury; (4) insurers of governmental entities may not take advantage of the § 11-46-13 non-jury provisions; and (5) third party indemnification claims and cross-claims against public entities should not be heard by juries, although it is uncertain whether the government's third party actions for indemnification and contribution would require bench trials.

D. Limitations on Liability

Section 11-46-15 of the Mississippi Code provides that governmental liability "shall not exceed [$250,000.00 from July 1, 1997 through July 1, 2001] for all claims arising out of a single occurrence for all damages permitted under this chapter . . . ."[729] Questions presented by this provision include whether the limitation on damages is unconstitutional, if the damage cap applies to multiple plaintiffs or defendants,[730] whether it may be waived, what damages it includes, and the rights of contribution where it applies.

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[729] MISS. CODE ANN. § 11-46-15(1)(b).

[730] It has been held that Tort Claims Act caps do not apply to independent contractors providing services to the government. *See* Greater Hammond Community Serv. v. Mutka, 699 N.E.2d 757, 760 (Ind. Ct. App. 1998) (holding that nonprofit bus company not protected by cap). Independent contractors are covered by damage caps only where the contractor provides services which are uniquely governmental in nature or the independent entity is administered by individuals who are responsible to and controlled by public officials or the general public. *Id; see also* Ayres v. Indian Heights Volunteer Fire Dep't, 493 N.E.2d 1229, 1235 (Ind. 1986) (holding that volunteer fire department is covered by damage cap of Tort Claims Act because it renders services uniquely governmental in nature).

1. Constitutionality of Limitation of Damages

In *Wells v. Panola County Board of Education*,[731] the Mississippi Supreme Court ruled that a similar limitation provision, namely, the $10,000 cap on damages contained in the former Accident Contingent Fund, violated neither the state constitution nor the federal constitution.[732] The court found that the Fund's damage cap did not violate the separation of powers doctrine embedded in the state constitution[733] because the legislature, not the judiciary, is the proper governmental branch to regulate sovereign immunity and any limitations on the government's payment of damages.[734] Furthermore, the court determined that the provision did not violate the "open courts"[735] or "remedy"[736] clauses of the state constitution, because plaintiffs had no right to sue the State prior to the waiver of immunity, so no rights were infringed by the cap.[737] And because the claimants had no legal right to sue the State beyond those rights granted in Mississippi's waiver of sovereign immunity, the court concluded that the State was free to denote $10,000 as the outer remedy of amounts recoverable pursuant to its waiver of immunity.[738]

Noting that plaintiffs suing the State did not comprise a suspect class such as race, age, gender, or disability, and that the right to sue the State was not a fundamental right, such as voting, the *Wells* court applied the rational relation test and found that the Legislature's limitation on damages was reasonably related to its purpose of conserving limited financial resources.[739] Consequently, the court declared, the damage cap violated neither the equal protection nor the due process protections found in the Fourteenth Amendment to the United States Constitution and Article III, Section 17 of the Mississippi Constitution of 1890.[740]

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[731] 645 So. 2d 883 (Miss. 1994).

[732] *Wells*, 645 So. 2d at 890.

[733] *See* MISS. CONST. of 1890, art. I, § 1; MISS. CONST. of 1890, art. IV, § 144.

[734] *See Wells*, 645 So. 2d at 889.

[735] MISS. CONST. of 1890, art. III, § 24.

[736] *Id.*

[737] *See Wells*, 645 So. 2d at 891.

[738] *Id.* at 890.

[739] *Id.* at 893-94. It is apparent that the preservation of public funds is an important governmental interest and that placing a cap on damages limits the impact of large jury awards on the public treasury. *Id.*

The court also concluded that the Fund's damage cap did not violate the right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution and Article III, Section 31 of the Mississippi Constitution of 1890, because state courts are not controlled by the Seventh Amendment[741] and the Mississippi Constitution only guarantees a right to a jury in common law actions, and the right to sue the State did not exist at common law by virtue of sovereign immunity.[742] The court's reasoning in *Wells* should apply to the Governmental Immunity Act's damage cap, just as it was recently held applicable in defeating an equal protection challenge mounted against the notice of claim provisions of the Act.[743]

Other state courts faced with constitutional challenges to similar limitation provisions at common law and pursuant to tort claims acts have held that such caps on damages do not violate the separation of powers doctrine,[744] open courts or remedy constitutional guarantees,[745] the constitutional right to a jury trial,[746] or any equal protection or due process rights.[747] Accordingly, there is little doubt that Mississippi's limitation on damages in actions against public entities will be found constitutional.[748]

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[740] *Id.* at 894-95.

[741] *Id.* at 897.

[742] *Id.* at 898.

[743] *See* Vortice v. Fordice, 711 So. 2d 894, 896 (Miss. 1998). Citing *Wells*, the court ruled that the notice provisions did not violate equal protection guarantees. *Id.*

[744] *See* Chamberlain v. State, 621 So. 2d 1118, 1126 (La. Ct. App. 1993) (wrongful death and consortium actions brought after fatal swimming accident); Wright v. Colleton County Sch. Dist., 391 S.E.2d 564, 570 (S.C. 1990) (declaratory judgment action concerning injuries on school ground); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 533 (Va. 1989) (malpractice action).

[745] *See Wright*, 391 S.E.2d at 570; Greist v. Phillips, 906 P.2d 789, 794 (1995) (wrongful death action pursuant to automobile accident); *Chamberlain*, 621 So. 2d at 1126.

[746] *See Wright*, 391 S.E.2d at 569-70; *Greist*, 906 P.2d at 796; Garner v. Covington County, 624 So. 2d 1346, 1354 (Ala. 1993) (action for negligent maintenance of intersection).

[747] *See Chamberlain*, 621 So. 2d at 1126; *Wright*, 391 S.E.2d at 570; *Etheridge*,

2. Application of Limitation to Multiple Parties

Does the damage cap apply to multiple plaintiffs and multiple defendants, and if so, is that application constitutional? How multiple parties are affected by damage caps depends entirely upon the brand of statutory scheme enacted by state legislatures. Cap schemes usually fall into one of three categories relative to the amount recoverable: (1) "per single incident or occurrence," (2) "per claim, injury or cause of action," or (3) "per person, or claimant or defendant."[749] Some cap schemes are hybrids, providing for recovery of an amount "per person" or "per claim" up to an aggregate maximum per "single occurrence."

The "per single occurrence" scheme is usually the most conservative, allowing a maximum aggregate recovery for a single tortious act, regardless of the number of plaintiffs, claims, or defendants involved.[750] The "per person" or "per claimant" standard permits awards up to the statutory limit for each person having a valid claim against any government wrongdoer.[751] The "per claim" statute allows recovery for each cause of action asserted by each claimant against each government tortfeasor.[752] The hybrid scheme, i.e., a "per person" or "per claimant" scheme with a further aggregate limitation "per

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376 S.E.2d at 530-31; *Greist*, 906 P.2d at 799-800. *But see* Ryszkiewicz v. City of New Britain, 479 A.2d 793, 799 (Conn. 1984) (providing different caps for different entities violates equal protection guarantees). Mississippi has no such inconsistent scheme, however, as all of her entities are subject to the same cap amount.

[748] For an excellent discussion of these issues, see James L. Isham, Annotation, *Validity and Construction of Statute or Ordinance Limiting the Kinds or Amount of Actual Damages Recoverable in Tort Action Against Governmental Unit*, 43 A.L.R. 4TH 19 (1986).

[749] *Id.* §§ 9-11.

[750] *See* County of Clark v. Upchurch, 961 P.2d 754, 759 (Nev. 1998) (discussing three cap schemes: "per occurrence," "per person," and "per claim").

[751] *Id.*

[752] *Id.*

occurrence,"[753] guarantees some recovery for all, but limits the total amount that the governmental defendant must pay, regardless of the number of plaintiffs. Mississippi's scheme, currently providing for recovery of up to $250,000 for "all claims arising out of a single occurrence for all damages," clearly falls into the "per single occurrence" category.

"Single occurrence" has been defined as an act or omission of a governmental employee which becomes the proximate cause of all the plaintiffs' claims and which embraces "those situations where the events resulting from [that] negligent act or acts . . . are closely linked together in time and location."[754] The definition lends itself to the view that "multiple proximate causes attributable to the governmental entity may combine with other concurrent causes to produce but a single occurrence."[755] Applying this reasoning, courts interpreting limitation clauses in insurance policies have focused upon the event which triggered liability,[756] rather than upon the effects of the accident (the number of persons injured)[757] or the proximate cause of the injury or injuries (how many causes of action exist).[758]

Pursuant to this analysis, a "single occurrence" damage cap has been held to include one automobile careening into and damaging several others[759] and the negligent maintenance of a landfill which damaged numerous neighborhood homes.[760] In both of these cases, all plaintiffs were forced to divide the maximum amount recoverable for the "single occurrence" between themselves. On the other hand, both a pure "per person" or "per claim" statute would have allowed the plaintiffs in both cases to make a recovery subject only to a limitation on amounts recoverable for each person or each claim, without having to divide any one aggregate damage sum amongst themselves.

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[753] *Id.*

[754] Folz v. State, 797 P.2d 246, 251-54 (N.M. 1990). In *Folz*, the court held that "all injuries proximately caused by the governmental agency's successive negligent acts and omissions that combined concurrently to create a singular, separate and unitary risk of harm" constituted a single occurrence. *Id.* Although the New Mexico statute is generally referred to as a "per person" scheme, it is a hybrid statute which also contains a "single occurrence" phrase limiting the combined recoveries of all plaintiffs to a maximum aggregate amount.

[755] Trujillo v. City of Albuquerque, 798 P.2d 571, 572-73 (N.M. 1990).

[756] *See, e.g.*, Folz, 797 P.2d at 250; Kuhn's of Brownsville, Inc. v. Bituminous Cas. Co., 270 S.W.2d 358, 360 (Tenn. 1954).

[757] *See Folz*, 797 P.2d at 250; Home Indemn. Co. v. City of Mobile, 749 F.2d 659, 662 (11th Cir. 1984) (stating rainfall and flooding are not "occurrences").

[758] *See Folz*, 797 P.2d at 250; Shamblin v. Nationwide Mut. Ins. Co., 332 S.E.2d 639, 644-45 (W.Va. 1985); *see generally* Michael P. Sullivan, Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount per Accident or Occurrence*, 64 A.L.R. 4TH 668 (1988).

An examination of other states' application of these schemes should provide answers to many questions concerning the practical application of Mississippi's limitation of damages scheme to multiple plaintiffs and multiple defendants.

(a) Multiple Plaintiffs

How the various schemes affect cases involving multiple plaintiffs may best be demonstrated by the differing results obtained by courts applying them in the loss of consortium context. In *Chamberlain v. State*,[761] a Louisiana court interpreted a "per occurrence" scheme[762] in the factual context of an injured swimmer's personal injury suit which accompanied his parents' loss of consortium claims. Refusing to treat the swimmer's damage claim and the two parents' consortium claims as three separate claims subject to the $500,000 cap, the court ruled that the statute did not provide that each claimant could recover the full amount; it merely provided for a total amount recoverable for the plaintiff's swimming injury.[763] Like Mississippi's statute, the Louisiana limitation emphasizes the total amount recoverable for any injurious event.

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[759] *See Folz*, 797 P.2d at 252-53.

[760] *See* Rumbough v. City of Tampa, 403 So. 2d 1139, 1142 (Fla. Dist. Ct. App. 1981) (holding that maintenance of city landfill over period of years is "incident or occurrence").

[761] 621 So. 2d 1118 (La. Ct. App. 1993).

[762] LA. REV. STAT. ANN. § 13:5106(B)(1) (West 1991). The statute provides that "in all suits for personal injury to any one person, the total amount recoverable . . . shall not exceed five hundred thousand dollars." *Id.*

[763] *Chamberlain*, 621 So. 2d at 1127.

Likewise, Oklahoma has decided that a "per occurrence" statute[764] limited one aggregate recovery in a wrongful death case brought by a widow acting individually as a surviving spouse and on behalf of her minor child.[765] A Colorado court also held that a cap statute[766] which limited damages recoverable "in any single occurrence" to $400,000 meant that where thirty-four bus passengers were injured or killed while riding in a state vehicle, those plaintiffs were required to divide a sum of $400,000 between them.[767]

Conversely, where a South Carolina Tort Claims Act limitations statute[768] provided recovery "for any action or claim," the South Carolina Supreme Court concluded that any person with a claim could recover up to the maximum amount allowed, including the person injured as well as each of the persons claiming loss of consortium.[769] Although the South Carolina scheme reads much like Mississippi's with its "per occurrence" language, the crucial distinction is that South Carolina's frames the word "claim" in the singular, while Mississippi's utilizes the plural, "all claims." This distinction leads to the allowance of multiple recoveries under the South Carolina "per claim" scheme, and to a limitation of a maximum amount for all claims per any "occurrence," as with Louisiana's and Mississippi's cap provisions.

Continuing our analysis of the four schemes vis-a-vis consortium claims, the Wisconsin Supreme Court interpreted a "per person" scheme[770] to provide a recovery of up to the maximum amount for each person with a separate cause of action, including both a husband's personal injury action and a wife's consortium suit.[771] Applying a hybrid "per claim/per occurrence" limitation scheme which provided for the maximum recovery of $200,000 per claim and a maximum recovery of $600,000 for "all claims arising out of a single occurrence,"[772] the Minnesota Supreme Court ruled that a husband's personal injury claim and his wife's loss of consortium claim constituted separate, recoverable claims.[773]

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[764] OKLA. STAT. ANN. tit. 51, § 154 (West 1991). The Oklahoma statute limits the total liability of the State for claims arising out of a single act, accident or occurrence.

[765] *See* Carlson v. City of Broken Arrow, 844 P.2d 152, 153-55 (Okla. 1992) (stating that legislative intent controls statutory interpretation).

[766] COLO. REV. STAT. § 24-10-114(1) (West 1998).

[767] *See* State v. DeFoor, 824 P.2d 783, 786 (Colo. 1992) (limiting damages where state tour bus struck by boulder).

[768] S.C. CODE ANN. § 15-78-120(a) (Law Co-op. 1998).

[769] *See* Wright v. Colleton County Sch. Dist., 391 S.E.2d 564, 568-69 (S.C. 1990).

[770] WIS. STAT. ANN. § 895.43(2) (West 1997) (current version at WIS. STAT

Evidently, insofar as actions concerning multiple plaintiffs are concerned, the "per claim" is the most liberal, with the "per person" standard being more generous than the conservative "per occurrence" scheme. Nowhere is this state of affairs more evident than in the hybrid schemes themselves, which liberally allow some recovery for all plaintiffs, but conservatively limit their recovery by one aggregate amount for all injuries arising out of a single occurrence.

Cases concerning non-consortium matters make this conclusion even more apparent. In *Rumbough v. City of Tampa*,[774] a Florida court decided that multiple property owners must divide $100,000 for damages to their homes occasioned by a city's negligent operation of a nearby landfill. Noting that the governmental limitation on damages statute provided for the payment of $100,000 for all claims "arising out of the same incident or occurrence,"[775] the court declared that word "occurrence" was broader than "incident" and that "occurrence" meant more than injuries occurring in one event or moment and could even include injuries of continuing nature which arose from one

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ANN. § 893.80). The Wisconsin statute provided that "the amount recoverable by any person for any damages . . . in any action . . . shall not exceed $25,000.00." *Id.*

[771] *See* Schwartz v. City of Milwaukee, 195 N.W.2d 480, 484 (Wis. 1972).

[772] MINN. STAT. ANN. § 466.04(1)-(2) (West 1994).

[773] *See* Rowe v. St. Paul Ramsey Med. Ctr., 472 N.W.2d 640, 643 (Minn. 1991) (holding that "per claims" scheme would have allowed both plaintiffs to recover $200,000 but for language of another derivative claims statute which merged their claims into one unseverable claim as matter of law).

[774] 403 So. 2d 1139 (Fla. Dist. Ct. App. 1981).

[775] FLA. STAT. ANN. § 768.28 (West 1997).

negligent act, policy or decision.[776] The court thus concluded that all property owners whose homes were damaged by the negligent maintenance of the landfill could only recover $100,000 between them, and since other neighbors had already received a hundred thousand in damages, these plaintiffs were left without any further recourse.[777]

On the other hand, the Georgia Supreme Court, interpreting a "per person" limitation statute,[778] ruled that in a wrongful death action, a plaintiff suing as both a personal representative and as administratrix of the deceased's estate constituted two distinct legal "persons,"[779] thereby allowing two recoveries of the maximum amount allowable per person.[780] A New Mexico court considering a "per person" cap provision also ruled that each claimant injured when a state truck careened out of control constituted a "person" and could recover the full amount allowed per person.[781]

In sum, a "per person" cap scheme allowed the Georgia and New Mexico courts to award maximal recoveries to multiple plaintiffs out of one death-causing incident. But as in Florida, Louisiana, Oklahoma, Colorado and Mississippi, where a limitation statute contains a "per single occurrence" provision, and no "per claim" or "per person" allowance, then all plaintiffs, regardless of their number, must split the total amount recoverable under the limitation statute, thereby potentially subjecting them to significantly reduced recoveries.

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[776] *See Rumbough*, 403 So. 2d at 1142-43.

[777] *Id.*

[778] GA. CODE ANN. § 50-21-29(b) (1998). Although considered a "per person" scheme, this statute is also a hybrid, providing for the recovery of $1 million per person for a loss arising out of an occurrence, with the State's aggregate liability for any single occurrence limited to $3 million. *Id.*

[779] *But see* City of Austin v. Cooksey, 570 S.W.2d 386, 387-88 (Tex. 1978). In *Cooksey*, the court ruled that the "per person" aspect of the limitation statute, which limited recovery to $100,000 per person, referred to the person injured or killed in the occurrence, and not anyone who suffered a loss as a result of any injury to someone else. *Id.* The court thus limited the deceased's estate to a recovery of $100,000 for his death, notwithstanding the fact that the widow and children constituted separate persons making wrongful death claims. *Id.*

[780] *See* Georgia Dep't of Human Resources v. Phillips, 486 S.E.2d 851, 856 (Ga. 1997) (demonstrating per person/per occurrence hybrid statute).

[781] *See Folz*, 797 P.2d at 250. As previously noted, New Mexico's scheme is of the "per person" variety, although it is also a hybrid, and the "per occurrence" provision limited the plaintiffs' recovery to a specified maximum aggregate amount. *Id.*

(b) Multiple Defendants

In "per single occurrence" jurisdictions, when plaintiffs bring actions against multiple governmental defendants, they may recover only one maximum aggregate amount, not the maximum amount against each public defendant. For example, in *Etheridge v. Medical Center Hospitals*,[782] the court found that the limitation statute[783] allowed the plaintiff to recover the maximum aggregate amount allowed only once, even though both the physician and hospital were guilty of malpractice.[784] In *Gerard v. Department of Transportation*,[785] a Florida court ruled that where a state's damage cap was $100,000, and a city employee and a state employee had combined to cause a plaintiff's injuries, if the plaintiff had sued the city first and recovered $100,000, he could not later recover additional damages against the state because he had already recovered the maximum amount against the city.[786] Likewise, other courts have ruled that a "per occurrence" statute imposes a cumulative per-occurrence limitation on any aggregate recovery regardless of how many governmental defendants may be involved.[787]

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[782] 376 S.E.2d 525 (Va. 1989).

[783] Section 8.01-581.15 of the Virginia Code limits recovery against "a health care provider" to "the total amount recoverable for any injury." VA. CODE ANN. § 8.01-581.15 (Michie 1995).

[784] *See Etheridge*, 376 S.E.2d at 535-36; *see also* Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517, 521 (La. 1992) (holding that plaintiff could only make one aggregate recovery of $500,000 for malpractice of several surgeons who operated upon her because of "per occurrence" language of section 40:1299.42B of the Louisiana Revised Statutes).

[785] 455 So. 2d 500 (Fla. Dist. Ct. App. 1984).

[786] *Gerard*, 455 So. 2d at 501; *see also* FLA. STAT. ANN. § 768.28 (West 1997). In *Gerard*, the city's insurance proceeds were applied toward the $100,000 limitation. *See id.* at 501-02.

[787] *See* Paris v. Feder, 688 N.E.2d 137, 139-40 (Ill. 1997); Trujillo v. City of Albuquerque, 798 P.2d 571, 572-73 (N.M. 1990). In *Feder*, the court interpreted title 225, section 455/23 of the Illinois Compiled Statutes (which sets the maxi-

By contrast, a "per person" or "per claim" standard usually allows plaintiffs to recover the maximum amount allowed against each defendant.[788] However, what may occur in "per person" jurisdictions is irrelevant to our analysis, as Mississippi's limitation scheme warrants application of the "per single occurrence" standard. This standard limits a plaintiff to recovery of one aggregate sum for damages arising out of a "single occurrence," regardless of the number of governmental defendants involved. Taking Mississippi's scheme into consideration, one must assume that if three plaintiffs in one vehicle were injured on June 1, 1999, in a multiple car wreck involving three state vehicles, or on a state highway negligently maintained or signed by a county, then the three plaintiffs would be forced to split a sum of $250,000 between them.

(c) Constitutionality of Limitation Scheme with Regard to Multiple Parties

Is a damage cap, which is ordinarily constitutional where one plaintiff and one defendant are involved, an unconstitutional limit on damages recoverable where multiple parties are concerned? The answer is apparently "no," as "per occurrence" statutes have been routinely found not to violate either state or federal constitutions with regard to their effect upon multiple plaintiffs[789] or multiple defendants.[790]

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mum liability "arising out of any one act") to mean that the plaintiff could recover the maximum amount only once and not against each tortfeasor. *Feder*, 688 N.E.2d at 139-40. In *Trujillo*, the City's negligent maintenance of a crane's brakes and a city employee's negligent operation of the crane combined to cause a collision with the plaintiff's vehicle. *Trujillo*, 798 P.2d at 572. The court held that New Mexico's "per occurrence" cap scheme limited the plaintiff's recovery to maximum amount recoverable for "single occurrence", i.e., to one recovery rather than two, despite the fact that the collision was caused by negligent acts of two defendants, the city and its employee. *Id.* at 573.

[788] *See, e.g.,* General Elec. Co. v. Niemet, 866 P.2d 1361, 1367-68 (Colo. 1994) (allowing recovery against multiple defendants pursuant to "per person" standard). *But see* County of Clark v. Upchurch, 961 P.2d 754, 761 (Nev. 1998) (holding that malpractice action against hospital and two doctors yielded only one recovery against all three public defendants using "per person per claim" standard).

[789] *See* State v. DeFoor, 824 P.2d 783, 789-93 (Colo. 1992); Lee v. Colorado Dep't of Health, 718 P.2d 221, 227 (Colo. 1986); *Chamberlain*, 621 So. 2d at 1126,

The prevailing view regarding the constitutionality of damage caps is that the right to sue the State is not a fundamental right, and persons suing the State are not a suspect class, so the State need only show a rational relation between its damage cap and the preservation of state funds.[791] The courts have held that the legislative decision to create a cap that diminishes returns for multiple parties is rational because it "proceeds from actual differences in the magnitude and character of the functions assumed by public entities and in the effect of greater potential liability exposure"[792] for governmental entities than for private ones. Said another way, the government cannot simply evade payment of its obligations by going out of business or filing bankruptcy, so it must be allowed to limit its obligations so that it may continue to provide the services that only the government may supply.

3. Waiver of Limitation

May Mississippi public entities waive the statutory cap on damages? If cases from other jurisdictions with similar damage caps have any application, the answer is "no." Courts interpreting common law damage caps have held that a public entity's failure to raise a cap defense during litigation does not waive a statute's limitation on liability, either because the cap's statutory status could not be surprising to the parties even in the event that it was not initially pled,[793] or because the cap constituted a "special limitation" on damages which was not waivable, as opposed to a mere affirmative defense, which is waived when not pled.[794] With the passage of tort claims act

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1127; Robinson v. Charleston Area Med. Center, Inc., 414 S.E.2d 877, 887 (W. Va. 1991).

[790] *See Butler*, 607 So. 2d at 521 (holding that Louisiana's Medical Malpractice Act did not violate state or federal constitutions).

[791] *See, e.g., Chamberlain*, 621 So. 2d at 1126.

[792] *Lee*, 718 P.2d at 227.

[793] *See, e.g.,* Jenkins v. State Dep't of Trans. & Dev., 619 So. 2d 1188, 1200 (La. Ct. App. 1993) (distinguishing liability cap from affirmative defense).

[794] *See* Mitchell v. State, 596 So. 2d 353, 357 (La. Ct. App. 1992) (holding that State did not waive damage cap by failing to specifically plead it at trial).

damage caps, the courts have focused upon whether the limitation is a jurisdictional provision and, hence, not waivable,[795] or merely an affirmative defense, which is waived by an entity's failure to timely raise it.[796]

As Mississippi's cap is a jurisdictional provision granted pursuant to a waiver of sovereign immunity, it cannot be waived by the failure of a public entity to timely raise it at trial, nor may a public entity voluntarily waive that which the Legislature has established as a jurisdictional limitation. Also, since § 11-46-15(3) of the Mississippi Code specifically allows defendants to move for reduction of damages subsequent to a judgment being taken in excess of the cap, there can be little doubt that failure to initially plead the cap does not suffice to waive its limitation amount.

Furthermore, purchasing liability insurance generally does not waive a statutory cap on damages.[797] The Mississippi Governmental Immunity Act, however, provides for a limited waiver upon purchase of excess insurance coverage. Section 11-46-17(4) of the Mississippi Code grants permission to all governmental entities to purchase excess coverage if they so desire and further provides for the waiver of immunity to the extent of excess liability insurance purchased. Accordingly, Mississippi governmental entities may waive the limitation on damages by purchasing excess coverage, but the waiver is only effective up to the amount of coverage and only for the risks covered in the policy. Finally, as the waiver statute only grants authority to governmental entities to waive the cap by purchasing excess coverage, an employee's purchase of private liability insurance coverage does not waive sovereign immunity and the government's damage cap.[798]

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[795] *See* Espinosa v. Southern Pac. Transp. Co., 624 P.2d 162, 167 (Or. Ct. App. 1981) (holding that school district's failure to raise its damage cap until after judgment was rendered against it did not waive cap limitation amount, as cap was jurisdictional and integral part of district's liability pursuant to Tort Claims Act's waiver of sovereign immunity); *see also* State Highway Dep't v. Pinner, 531 S.W.2d 851, 858 (Tex. Ct. App. 1975) (stating that Act waiving immunity and allowing recovery may impose such conditions as it wishes, including statutory cap on damages that may not be waived by government).

[796] *See* Cain v. Macklin, 663 S.W.2d 794, 796 (Tenn. 1984) (ruling that limitation provision was affirmative defense, not jurisdictional provision, and as such, was waived by defendant's failure to plead it prior to rendition of judgment against it).

[797] *See* Mench v. Lower Saucon Township, 632 A.2d 1011, 1014 (Pa. 1993); Coburn v. City of Dyersburg, 774 S.W.2d 610, 612 (Tenn. Ct. App. 1989).

4. Application of Limitation to Costs, Attorneys' Fees, Punitive Damages and Reductions of Verdicts

Section 11-46-17(2) of the Mississippi Code provides that punitive damages and interest may not be recovered against governmental entities and that attorneys' fees may be recovered only where they are otherwise authorized by law. Subsection (3) further provides that when any judgment is taken under the auspices of the Act which, after inclusion of costs and allowable attorneys' fees, exceeds the maximum amount recoverable under subsection (1), the court "shall" reduce the verdict and enter an amount not to exceed the maximum allowed by subsection (1).

Most state damage caps do not mention costs and attorneys' fees; instead, they merely establish an outer limit of recovery against governmental entities. Interpreting such schemes, other state courts have held that attorneys' fees and costs are not recoverable over and above the limitation amount, although they may be included in damages recovered up to the maximum cap amount.[799]

Mississippi's damage cap clearly provides that costs and allowable attorneys' fees may not be added to any judgment in such a manner as to exceed the maximum recoverable amount. Punitive damages and interest are simply not recoverable against our governmental entities, as courts interpreting statutes similar to § 11-46-17(2) have made abundantly clear.[800]

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[798] *See* Nelson v. House, 402 N.W.2d 639, 641 (Minn. Ct. App. 1987).

[799] *See, e.g.,* Berek v. Metropolitan Dade County, 422 So. 2d 838, 840-41 (Fla. 1982); Griffin v. Tri-County Metro. Transp. Dist., 870 P.2d 808, 815 (Or. 1993). However, the Mississippi Supreme Court recently held that although pre-judgment costs are not recoverable in actions against Mississippi public entities, post-judgment interest, statutory damages, and court costs are recoverable up to the limit of liability. *See* City of Jackson v. Williamson, 95-CT-01072-SCT, 1999 WL 93609 at *8 (Miss. 1999).

[800] *See, e.g.,* Frank Briscoe Co. v. County of Clark, 643 F. Supp. 93, 99-100 (D.

Furthermore, it has been held that caps banning punitive damages do not violate equal protection rights.[801]

Finally, considering the mandatory "shall" language in the reduction of damages clause of subsection (3), a Mississippi trial or appellate court has no choice but to reduce sua sponte any judgment awarded in excess of the cap amount, even where the governmental entity fails to request reduction down to the cap maximum on its own post-trial motion.[802]

5. Right of Contribution Where Cap Applied

(a) Joint and Several Liability

How is the right to contribution between co-defendants affected by Mississippi's damage cap? There are several circumstances in which the cap could affect joint tortfeasors, especially in the joint and several liability context. Suppose that the City of Hattiesburg's insurer paid a judgment taken against it and the State, jointly and severally, in the amount of $750,000, by resorting to the City's excess coverage policy. Would the city's insurer be entitled to contribution from the State? Since actions for contribution and indemnity are covered by the Governmental Immunity Act,[803] the insurer would probably be

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Nev. 1986) (applying Nevada Tort Claims Act law); Allen v. State, 535 So. 2d 903, 914-15 (La. Ct. App. 1988); Folz v. State, 797 P.2d 246, 257 (N.M. 1990).

[801] *See, e.g.,* Westlands Water Dist. v. Amoco Chem. Co., 953 F.2d 1109, 1113 (9th Cir. 1991) (applying California Tort Claims Act law, holding that statute barring punitive damage recovery against State but allowing State to recover punitive damages against private tortfeasors did not violate equal protection).

[802] *See, e.g.,* Wilmer v. Board of County Comm'rs of Leavenworth County, 69 F.3d 406, 409 (10th Cir. 1995) (applying Kansas Tort Claims Act, holding that trial court was required to modify and reduce judgment in excess damage cap maximum); Benson v. City of Birmingham, 659 So. 2d 82, 84 (Ala. 1995) (stating that where government failed to make post-trial motion for reduction of damages to cap amount, the trial court must still reduce award if defendant is governmental entity).

[803] *See* Mississippi Transp. Comm'n v. Jenkins, 699 So. 2d 597, 599 (Miss. 1997) (stating that Immunity Act's provisions apply to indemnity actions). It has also been held that an immunity act's provisions apply to subrogation actions. *See Health Plus of N. M., Inc. v. Harrell*, 958 P.2d 1239, 1243 (N.M. Ct. App. 1998) (holding that because New Mexico Tort Claims Act applies to subrogation actions, subrogation cause of action accrues at time of injurious occurrence for claim no-

entitled to contribution, although it could never recover more than the maximum cap amount (currently $250,000) from the State in their indemnity action.[804]

Suppose that a plaintiff were to bring an action against a governmental entity and a private defendant. If the damages amounted to a total of $750,000, would the plaintiff be able to recover $500,000 from the private defendant after the government had paid its maximum cap amount of $250,000, or would the private defendant be liable for only $250,000, by virtue of being deprived of his right of contribution? In answering that question, a Texas court ruled that the full damage amount left owing the plaintiff could be recovered against the private defendant after the cap limited the public defendant to paying less than it owed.[805] The purpose of the "per single occurrence" damage cap, the court reasoned, was to limit the amount of damages paid by the State, not to limit the amount recoverable by the plaintiff.[806] Furthermore, the court declared that the result should be no different than the one obtained when "one defendant is saddled with an insolvent co-defendant."[807] Considering the purpose behind joint and several liability, a claimant should still be able to recover his full award even though one of the defendants was unable to pay its full pro-rata share. Although a different result would be obtained in a "per person" jurisdiction,[808] Mississippi's Act contains a "per single occurrence" provision, making it logical to assume that there is nothing in the wording of the cap that would prohibit a plaintiff from recovering the balance of judgment awarded against a private defendant after the application of the cap to the government's liability left a substantial amount owed to the

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tice and limitation purposes).

[804] *See Benson*, 659 So. 2d at 86 (holding that city's statutory obligation to indemnify its employee could never be enforced above and beyond amount of damages allowed by statutory cap).

[805] *See* Duke v. Wilson, 900 S.W.2d 881, 884 (Tex. Ct. App. 1995).

[806] *Id.*

[807] *Id.*

[808] *See* City of Austin v. Cooksey, 570 S.W.2d 386, 388 (Tex. 1978) (finding that "per person" scheme evinced legislative intent to limit amount recoverable by each "person").

plaintiff, as long as the defendants had been held jointly and severally liable.

(b) Apportionment

How does the cap affect apportionment between public and private defendants? For example, where a governmental entity and a private defendant are both found to be 50% liable for a plaintiff's injuries, must the two defendants ascertain their pro-rata liability before or after applying the statutory cap to the governmental defendant's liability? Suppose the damage amount was $500,000. Could the State take the position that its cap provided for a maximum liability of $250,000, and that since it was only 50% at fault, it could reduce its damages by 50% and pay only $125,000, while the private defendant should pay $250,000? Or should the State ascertain its pro-rata liability before applying the cap, i.e., declare that it owes 50% of the $500,000, or $250,000?

Utilizing the "per occurrence" versus "per person" analysis, our conclusion must be that Mississippi's cap was not intended to reduce the amount of a plaintiff's award, but only to guarantee that the government pay no more than the statutory cap amount. Accordingly, the State would be required to pay the full $250,000 in damages in the above situation. Other state courts considering this question have reached the same conclusion.[809]

For another example, suppose a passenger injured while riding in a car driven on a negligently maintained city road sued the City for $5.75 million dollars, and the City defended by alleging that the driver was 50% at fault. Could the city declare that it was only liable for a maximum amount of $250,000 and then reduce that amount by 50%, thereby paying only $125,000? In *State Department of Highways v. Cotner*,[810] a Texas court ruled that a state agency could not do so and that it must apply its percentage of comparative responsibility prior to applying its $250,000 cap, with the result that it bore 50% responsibility for the $5.75 million award, thereby owing the plaintiff its full cap amount of $250,000.[811]

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[809] *See, e.g.,* General Elec. Co. v. Niemet, 866 P.2d 1361, 1365-68 (Colo. 1994). In *Niemet*, the court interpreted section 13-21-102.5(3)(a) of the Colorado Revised Statutes, which provides that "the total of such damages shall not exceed $250,000." *Id.* The court ruled that the government and private defendants were required to ascertain their pro-rata share of liability *before* applying the statutory damage cap. *Id. But see Cooksey*, 570 S.W.2d at 388. In *Cooksey*, the court interpreted a "per person" cap statute to mean that the Legislature specifically intended to limit the amount that each person could recover against the city and thus allowed the city to apply the cap prior to apportioning its pro-rata share of damages. *Id.* The result was that the plaintiff did not receive his full damage award and the city did not pay its full cap amount. *Id.*

As of this writing, the Mississippi Supreme Court has yet to decide this issue, but if it follows the aforecited precedent, the result should be that multiple defendants, whether private or governmental, will be required to ascertain their pro-rata liability before the court applies the statutory cap to the governmental defendant's (or defendants') liability.

IV. CONCLUSION

Thus far, the Mississippi Supreme Court has followed legislative intent and held that the Mississippi Governmental Immunity Act's notice requirements are jurisdictional, and has in similar spirit, rendered decisions literally interpreting the venue, individual immunity and statute of limitations provisions. The court has, in furtherance of presumed legislative intention, liberally applied exemptions to shield government entities from liability. If the court continues in this strict construction fashion, there is little reason to doubt that it will also uphold the government's absolute right to non-jury trials and insure that no judgments be taken against Mississippi's governmental entities in excess of the maximum amount allowed by the Act's limitation on damages.

Some of the court's recent decisions, however, suggest that it may be taking a more pro-plaintiff stance in its interpretation of the Act, thereby allowing a greater opportunity for injured parties to recover against negligent governmental entities. Whether this new approach is fueled by changes on the court or by a court-wide philosophical shift toward loosening the governmental purse strings is uncertain. The national trend in the sovereign immunity milieu involved an early conservative view of recovery subsequent to the various states' waiver of sovereign immunity, followed by a more liberal recovery-favoring policy in response to the unfairness to injured citizens occasioned by strict statutory construction of notice and exemption statutes. The most recent movement is back towards a middle-ground construction designed to establish both a reasonable recovery for injured citizens and to appropriately limit diminution of already scarce governmental financial resources.

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[810] 826 S.W.2d 692 (Tex. Ct. App. 1992).

[811] *Cotner*, 826 S.W.2d at 694.

Mississippi waived sovereign immunity later than most states, so it is reasonable to assume that our legislature and courts are merely reacting to the will of the people in much the same manner that other state courts and governing bodies have done before them. And with some catching up to do, it is not surprising that our supreme court is carrying us through the process at an accelerated rate. Although this circumstance may have the unfortunate result of leaving many lawyers and their clients in an uncertain position vis-a-vis the current status of Governmental Immunity Act law, they may take solace in the fact that other states have endured this process without suffering substantial turmoil and that, precisely because of other states' familiarity with this process of achieving ultimate justice for all, there exists a wealth of case law to which our bench and bar may resort for elucidation.

THE DUNBAR LECTURE

LIFE BOATS, DESERT ISLANDS, AND THE POVERTY OF MODERN JURISPRUDENCE

Delivered by Professor Richard Epstein[*]

DEAN SAMUEL DAVIS:

This lecture series is a cooperative effort between the Department of Philosophy and Religion and the School of Law. We are pleased to have the two benefactors of this lecture series here with us today, Jack and Wylene Dunbar, and I would like to ask them to stand now and be recognized.

We appreciate what you both do with regard to this lecture series and all that it adds to the educational life of the law school and intellectual life of the law school.

I will call on Professor Michael Hoffheimer now to introduce our lecturer today. Professor Hoffheimer is professor of law and a holder of the Mississippi Defense Lawyers lectureship and he serves as chair of our faculty speakers' committee, but also serves on the special Dunbar lecturers' committee and does an excellent job with both. And since he has his Ph.D and M.A. degrees in history from the University of Chicago, I thought it fitting that he introduce our lecturer today. Professor Hoffheimer.

PROFESSOR MICHAEL H. HOFFHEIMER:

Thank you, Dean. Thank you, Jack and Wylene Dunbar.

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[*] James Parker Hall Distinguished Service Professor of Law, University of Chicago School of Law. This text is a revised transcript of the lecture given by Professor Epstein on September 24, 1998, at the University of Mississippi School of Law. My thanks to Laura K. Clinton for her careful assistance in the preparation of the revisions of the text.

Good afternoon to all of you.

It is my great honor to introduce our speaker today, Professor Richard Epstein, the James Parker Hall Distinguished Service Professor of Law at the University of Chicago. At this point I really should sit down because, as you probably know, there is a rule that the more famous the speaker, the shorter the introduction. And there is no scholar in America who is more important, more influential, more controversial, and more well known than Professor Epstein. So I should sit down. But that would still make the Dean's introduction of the introducer longer than my introduction of our lecturer, so I need to go on a bit longer, and I think the Dean wanted more biographical information.

Professor Epstein has been teaching at the University of Chicago Law School since 1972. Before that he taught at the University of Southern California from 1968 to 1972. He received his bachelor's degree from Columbia University, summa cum laude and was inducted into Phi Beta Kappa. Then he went to Oxford, the other Oxford, to receive a law degree. He got a B.A. in law there with first class honors.

The trip to Oxford was unusual. Few American lawyers receive legal education in England. Professor Epstein has testified in autobiographical remarks how important it was for him to be let loose in Oxford on old English legal decisions. It may have been his first exposure to laissez faire—laissez faire education where teachers would simply tell him to go read judicial opinions and all he could find were old nineteenth-century English cases. Those opinions exerted a tremendous influence on him. Thus while students in France and Berkeley and Columbia were manning the barricades, Richard Epstein was in Oxford reading old English legal opinions, developing very peculiar ideas. After Oxford, he attended Yale Law School, graduating from Yale cum laude and as a member of the Order of the Coif.

Professor Epstein's academic career has been remarkable. He has published nine books, each a significant contribution to legal scholarship. Perhaps most famous is his 1985 book *Takings: Private Property and the Power of Eminent Domain*, which was waved by Senator Biden at the confirmation hearings on Justice Thomas. Senator Biden declared that anyone who believed in the book was certifiably unqualified to sit on the United States Supreme Court. I am very pleased to welcome the author of that book here today.

Professor Epstein's more recent books include *Simple Rules for a Complex World* (in 1995); *Mortal Peril: Our Inalienable Right to Health Care* (in 1997); *Principles for a Free Society: Reconciling Individual Liberty and the Common Good* (in 1998). It makes you wonder what happened to 1996, doesn't it? The answer is found in a search of on-line databases that reveals 318 law review articles authored by or about Professor Epstein. He keeps busy.

A recipient of the highest possible forms of recognition from the world of academics and letters, Professor Epstein is a member of the American Academy of Arts and Sciences. Perhaps more important for those in the know, he was invited to participate in the Latke-Hammentaschen debate at the University of Chicago, the sign of true celebrity status for a scholar. The Latke-Hammentaschen debate is the Chicago equivalent of our local debate about Memphis dry ribs as opposed to wet ribs. Except it is kosher. I could not find out which side Professor Epstein took in the debate—I assume it was the wrong side.

Last but not least, Professor Epstein is a nice guy. Now lots of people are called "nice," but economists will be suspicious. We can actually prove Professor Epstein is nice because I discovered through my research that there is a fair market value for niceness. At an auction in 1997 at the University of Chicago, one single day of recreational time with Professor Epstein fetched the record price of $1,000. So we can say with confidence, having determined this on the open market, that Professor Epstein is a nice guy. Without further ado, I present Professor Richard Epstein.

PROFESSOR RICHARD EPSTEIN:

I am very grateful for Michael's kind introduction. I also want to thank at the outset the Dunbars and Dean Davis, as well as everyone else at the University of Mississippi Law School who has shown me such hospitality since I arrived in Memphis at 11:00 A.M. My first task, given Michael's introduction, is to tell you which side I took on the Latke-Hammentaschen debate in which I participated twice. The second time I came up with a genuinely clever idea. My compatriots at the University of Chicago have been debating the merits of these two foods for thirty years. I decided that I would represent the dispossessed, the unwashed and the marginalized, so I pleaded the case of the Kinesh and all other foods that had been slighted and excluded in the traditional deliberations. It was, I suppose, a backhanded way to preserve my dubious reputation for contrarian thought.

THE DECLINE OF PHILOSOPHY

So I shall continue that practice today. When Michael asked me what topic I wanted to talk about, I said, well, let it be about the poverty of modern jurisprudence. Unfortunately, he neglected to tell me that my lecture was going to be sponsored in part by the philosophy department. Although I have probably generated a bit more heat than I had bargained for, I am not going to retreat from my title, but I do hope to make clear why in the end I link the poverty of modern philosophy (much of which is practiced by nonphilosophers) to the lifeboat and the desert island. That said, I shall also try to be a tad more sympathetic to my latent philosophical impulses than might otherwise have been the case.

At the outset, a brief confession is appropriate, lest there be any confusions about my own training. I was a philosophy major as an undergraduate at Columbia College in New York City in the early 1960's. Thereafter, when I went to the other Oxford, in England, in the mid-1960's, the University was still in the last throes of its great philosophical revival of the 1950's. Then, at least, philosophy as a discipline was riding high. Oxford's H.L.A. Hart had an enormous reputation in both England and the United States, as did Lon Fuller from Harvard. Their great debate in the *Harvard Law Review* was a staple of English legal education.[1] Yet if you look at philosophy today, our most notable philosopher is somebody who recently spoke here—Ronald Dworkin—whose work is more as a controversialist and public intellectual rather than a pure, technical philosopher. So as I became more closely identified with law and economics, I started to ask myself whether that shift was in response to what I perceived as the decline of modern philosophy and, by implication, the decline of modern jurisprudence. Both in power and influence, I think that philosophy has lost its position of intellectual leadership in modern academic discourse.

The first question is what reason is there to believe that the decline has taken place at all? I can think of several possible measures.

The first of these measures looks at the balance of trade as between cognate disciplines. Now this may sound like the theory of international trade carried over to academic affairs, and it is, but instructively so. During the late 1950's and early 1960's philosophy had high prestige among the disciplines, so that our quest was to figure out how philosophical insights could be used in law and the social sciences, its collateral disciplines. Economics at that time enjoyed a lower status, and its practitioners made little effort to colonize collateral areas. Philosophy appeared to be a net exporter; economics lay off the major trade routes. Today matters have shifted dramatically, as economics has become a major supplier of ideas to other academic disciplines. Economic theory has invaded political science through the vehicle of public choice; it has obviously transformed the study of law, not only in such obvious areas as antitrust and regulated industries, but in virtually all common law subjects as well. The economics of information has become a staple of analysis. Transaction cost economics helps understand how the world operates with friction. Institutional economics has given us a much richer understanding of both the contracting process as it operates in the marketplace and within the family. Even constitutional law is better understood in light of economic theory than without it. The link between economic theory and sociobiology is apparent to anyone who has examined the overlap between the two areas. The treatment of parent/child conflicts, for example, bears a close relationship to the study of agency costs in general, for in both areas the key topic for discussion is conflict of interest between two individuals who largely share the same objectives, but who bear the costs and benefits of their common enterprise in somewhat different proportions. It may well be that modern economics as practiced in the economics department has become, as has been described to me, a form of recreational mathematics. I also fear that economics will not be able to duplicate its former triumphs in the coming generation. Taking the present into account, however, the offshoots and spillover of economic theory have enriched the study of everything from the bail system to the corporate takeover.

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[1] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

Philosophy, however, has been unable to fertilize other disciplines, and too often it has thus turned inward on an ever smaller set of problems that have been investigated for decades and perhaps centuries. When it does expand into collateral areas such as medical or business ethics, my own sense at least is that it does so by incorporating ideas from other disciplines, such as game theory or price theory, into its own work. Left to its own devices, philosophy has become more remote, more obscure, and less engaged with the rest of the academic community. It is running an intellectual trade deficit, which has grown with each passing year.

One telling sign of this internal stagnation is the pace of the intellectual debate. I have been away from many philosophical discussions for thirty or thirty-five years, and yet when these topics arise again—what is truth? what is the relationship of logical to empirical propositions?—I sense an eerie similarity to earlier discussions. The permutations have become more refined, but it is not as though the discipline has replenished itself from within. The classic authors have a very long life in the field, and deservedly so. Yet, so long as the wisest thing is to read Locke, Hume and Kant, then the question is, what new comes from a discipline whose greatest authors are long dead? In my own academic career we have seen two admittedly philosophical classics, John Rawls's magisterial *A Theory of Justice* published in 1971, and Robert Nozick's provocative *Anarchy, State, and Utopia* published, in part as a reply, in 1974. It has been a quarter of a century since Nozick's great work, and in that time we have not seen any philosophical work of comparable stature to either. The synthetic power is just not there. Institutional economics has given us a much richer understanding of both the contracting process as it operates in the marketplace and within the family.

TWO ACHILLES HEELS

It is fair to ask why philosophy has run into such trouble in dealing with legal or social issues. I can think of two possible reasons. The first reason is that modern philosophy has not been able to generate a central theorem, that is, some major proposition whose descriptive and predictive value helps organize vast portions of some relevant social universe. All successful disciples start from just this kind of central theorem. Newtonian Mechanics or modern relativity theory both stem from a small coherent set of propositions that permit us to deduce conclusions that could never be reached by simple intuition alone. The basic Darwinian principle of natural selection generates an enormous set of testable propositions about cooperation and conflict in nature. These theories are not just logical systems that cohere. They are systems whose internal logic is experiencially and descriptively based. Thus, even when their conclusions are counterintuitive, they can be tested experimentally. That's enormously important to the ability of physical science to continue to move forward.

Both the physical and biological theories can be reduced to general laws in which something is maximized or minimized. Thus, in biology the question is how each organism maximizes its inclusive fitness (the success of itself and its offspring) in a complex environment in which other organisms have the same program. From these humble origins, we can make confident predictions about the different strategies of reproduction for different species, the different mating and parenting strategies for males and females of any species, or the different foraging and hunting strategies found in nature.[2] The central theorem directs the empirical research that allows a discipline to thrive.

What is striking about modern philosophy is that, for the most part, it has no such central theorem. In the alternative, philosophy's purported generalizations are incorrect and, as such, incapable of generative power. Ronald Dworkin, for example, has long championed as the central tenet of moral philosophy the proposition that all individuals are entitled to equal concern and respect. Now, at some level, that proposition has to be correct to the extent that it condemns regimes that practice apartheid and segregation. It is surely the case that we have not adequately justified the public distribution of rights and duties solely by showing that one person or group happens to be favored by those holding temporary political power. But what is missing from this argument is any substantive account of the dimensions over which individuals should be equal and why. It surely is not sufficient to show all individuals equal concern and respect by showing no respect or concern for any person. We can produce a system of perfect equality and perfect indifference by having a world in which everyone starves. So it becomes indefensible to adopt any position whose major function is to minimize the level of differences in satisfaction between persons. Instead, we have to look to a system that will maximize the level of wealth and happiness of all persons. We must also recognize that the price of general progress is some tolerance of difference in the life fortunes of individuals within any social order. A system that maximizes the equal and like liberty for all individuals will tend to do a better job in the long run than one that worries only about differences in end-state equalities. But that system can only be achieved and justified by some understanding of how institutions of property and contract work to improve the overall lives of the citizens it governs. For that knowledge, we turn not to philosophy but to economics, which supplies some guidance on how to maximize social welfare under conditions of scarcity and uncertainty. The philosophical aspiration is stillborn without the economic content.

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[2] For discussion, see EDWARD O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975).

From what has been said, it should be clear that my own present inclination is to defend theories that rely heavily on that of Pareto superiority. It is always desirable to look for situations where it is possible to make at least one person better off by his own lights so long as no other person has been made worse off. If one state of the world is Pareto superior to another, it is hard to oppose the adoption of that preferred position. But how do we know when we have reached a stable position? Here we can receive some help from the idea of Pareto optimality, which indicates that the path to easy progress ends when the only way in which one person can be made better off is for some other person to be made worse off. At this point, the tension between equality of wealth and overall economic well-being become apparent; all too often, the superior states turn out to feature an inequality of wealth that brings about higher levels of overall human satisfaction. Yet, should we prefer a world in which all persons are stuck at 1, to one in which some persons are at 10 and others are at 100? It is always possible to generate a system that minimizes the envy of the worst off in some social state. It is far less clear why that concern should dominate public discourse, given its effects on everyone else. Parity of fortunes and productive outcomes are not a compatible combination.

The second affliction of philosophy stems from a built-in disability that is not easy to cure. Philosophy never has to worry about the necessity of choice or about the perils of implementation. In one sense, it is fortunate that philosophers do not have to worry about strategic surprises that lawyers can pull in trial or their emotional appeals to jurors. Their insulation from the legal process allows for judgments to be made not in haste but only after reflection. But we cannot ignore the downside of abstraction. Litigation generates concrete facts that require some real world response. Lawyers, therefore, must deal with real controversies and not imagined hypotheticals. They must fish or cut bait in ways certain to leave someone dissatisfied. Once they realize that people's lives and fortunes may hang in the balance on the evidence presented or the theories of liability accepted, then it is hard to display either the flippant moral relativism, the abstract disputation, or the endless reflection that all too often dominate philosophical discourse. The enormity of choice and the reality of suffering lead people to articulate reasons that are calculated to persuade neutral parties. The appeal to workable rules and principles is born from the necessity to justify choice. The richness of factual palate sharpens our understanding of the content of the rules that we endorse or reject. A philosopher may be able to speak of the importance of keeping promises, but it is the lawyer who works from the ground up with the gritty material of consideration, mistake, frustration, conditions, modification, and discharge. The legal tool kit, then, is rich with implements that enable skilled lawyers to develop a level of practical wisdom and intellectual sophistication that is often missing in pure philosophical discourse. Only the philosopher (and the law professor too eager to abandon his comparative advantage) has the luxury of saying: "Gee this is a very hard case, we've got to know more, I can not really decide it, come back next week, let us try again." Lawyers do well running against adversaries and deadlines.

The inexorable demands of practice provide much grist for the mill. But grist is not the same as the mill itself. One of the great challenges is to convert the insights from individual cases into a comprehensive system of thought. It is by no means an easy task; indeed, it is one that is fraught with obstacles. In this context, the challenge is to figure out what legal rules and social institutions have, roughly speaking, the best chance of leading to the maximization of social satisfactions. Unfortunately, a lot of philosophical effort is designed to show why this mission cannot succeed, rather than in helping to explain how it can be best done. Let me mention some of the obstacles that have to be faced and that make me pessimistic about the role of philosophical reflection in legal analysis.

LINGUISTIC SKEPTICISM

The first challenge to legal analysis is linguistic skepticism which often surfaces in modern thought. I treat this as an overrated obstacle to intellectual knowledge. In this lecture, I have spoken now about twenty minutes. Perhaps many in the audience disagree with what I have said, or wish that I had spoken slower out of respect for local norms. Nonetheless, I do not think my words are so incomprehensible that they do not cohere as ordinary sentences. It is not as though I'm speaking Greek or Portuguese to you; it is just English with a New York accent, a price I hope that you are prepared to bear. But philosophical analysis sometimes makes the commonplace obscure, and thus undercuts theoretical work before it begins. For example, I have been accused, rightly so, of being an ardent defender of what I would like to think is a reasonably sophisticated form of laissez faire economics, one which learns from the mistakes of the nineteenth century in seeking to carve out a protected domain for market transactions even in a world that requires government action to secure order and provide infrastructure. I am unhappy about the prospect of being proved wrong, but I take that as an occupational hazard. What I find unacceptable is the constant refrain that my set of beliefs is not wrong, but simply incomprehensible. Thus one target of attack is the familiar proposition that the first step toward maximizing human freedom is the elimination of force and fraud in voluntary human relations. The clear implication is a preference for voluntary exchange over private coercion, which covers either the use or threat of force to get something that you could not otherwise obtain. A threat that says "your money or your life, please" and then graciously lets the other person decide which to surrender does not cut it.

Yet some very prominent writers, starting with Robert

Lee Hale,[3] have claimed that we simply do not know of what we speak when we talk about coercion. If we lack any clear sense of coercion, then it is no longer possible to carve out a moral universe that allows voluntary exchanges but forbids coercive transactions. Hale's decisive example of the ubiquity of coercion covers the case of a routine refusal to deal. Let us suppose that I apply for a job at the law school, but Dean Davis refuses to hire me unless I work for a stipulated wage—that's an act of coercion. Alternatively, if I turn down his offer, then I have coerced him. Whenever you are asked to bow to the request of another individual, you have been coerced.

This new definition of coercion becomes so swollen that each time you post a job for which you hire only one candidate, then you have coerced all the others. This definition leaves so much coercion out there in the world that the task of decision is transformed; now all we can do is to decide which uses of coercion are justified and which are not. No longer can we look to coercion itself as a discriminant between proper and improper human conduct. Now every offer has to be examined for its overall desirability. We have to start over from the top in order to decide when you're allowed to make offers, when you're going to be prohibited, and why. This approach reduces coercion to a meaningless term that no longer pulls any weight in ordinary discourse.

This unfortunate approach treats the first task of philosophy as putting forward conundrums that only philosophers can solve. It ignores the primary mission of the field, which is to show how it is possible, even necessary, to make sense out of simple, ordinary, day-to-day cases. Language could not work over the long haul if it routinely generated the conceptual tangles attributed to coercion. Our philosophical instincts should gravitate toward understanding, not confounding, ordinary practice. Once we take coercion seriously, then we shall have to distinguish between two polar opposites: the gun to the head and the ordinary refusal to deal. If grand theory calls both forms of "coercion," then, one level down, we have to distinguish between two forms of coercion, the first of which is generally prohibited and the second generally allowed. But why go through that two-stage exercise at all? It is so much easier to confine coercion to the first class of cases than it is to introduce a broad definition of coercion that is incapable of doing any work on its own. The line between theft and exchange remains secure.

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[3] Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472-73 (1923). Hale was a philosophically minded economist. On his work, see BARBARA FRIED, PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998). For my forthcoming review of Fried's book, see Richard A. Epstein, *The Assault that Failed*, at MICH. L. REV. (forthcoming 1999). His work has been taken up by philosophers. *See, e.g.*, G.A. COHEN, SELF-OWNERSHIP, FREEDOM AND EQUALITY (1995). Other philosophers are much more supportive of ordinary language. *See, e.g.*, ALAN WERTHEIMER, COERCION (1987).

Once we have drawn that line, however, it does become instructive to ask the further question of whether all refusals to deal should be treated in the same fashion just because they are placed in opposition to the use or threat of force. A look at some of the common law cases on this subject suggests that at least one further distinction is appropriate. Only this time we take our cue, not from abstract philosophy, but from one elementary economic distinction that in the end dovetails well with ordinary language.

Let us suppose that we have a common carrier which provides the only bus service between two towns. Or our carrier could be the only railroad link between two destinations, or the only power company within a given locale, or the single phone company that hooks you up to the telephone network. Now the carrier's refusal to deal carries with it far graver implications than it would in ordinary competitive markets where consumers have many other choices when they are unable to strike a deal with one merchant. To be sure, we do not have a gun to the head. But ordinary language speaks about bottlenecks and strangleholds. It talks about having someone over a barrel, or taking advantage of their situation. In other words, it marks out for special treatment those situations where one person has to do business with another, or do without some essential service altogether.

Armed with these intuitions, the common law courts have long held that businesses with strong monopoly positions fell under a duty to engage in nondiscriminatory dealings with their customers.[4] Common carriers had to take all customers at reasonable fares, and could not arbitrarily turn them down. It is not as though our social ideal is to stop common carriers from running at all, as it is with the core cases of force and fraud. The duties that regulate the provision of service are not directed to coercion in the strongest sense of that term; in contrast to cases of the threat or use of force, they allow the common carrier to go forward with business, and to earn a reasonable rate of return, even as they limit the terms on which trade can take place. By isolating these common carriers for special treatment, we do not commit ourselves to a theory that spills over to cover all transactions; nor do we face the absurdities that arise in giving coercion the open-ended definition that appealed to Hale. In consequence, our understanding increases: it becomes possible to explain other features of the doctrine. We now know why we allow regulated monopolists to charge for their services. We also understand why customers have no reciprocal duty of fair dealing with monopoly service providers: the customers have no monopoly power of their own. Careful attention to economic issues structures the game in ways that allow us to understand more, not less, about the law. The infusion of economics into law has a far more constructive effect than the infusion of philosophy.

MORAL RELATIVISM

Having heard these arguments, you might think that I have directed my fire power at the intellectual left. Do I have anything to say about the American right? Recently, my long-time colleague Judge Posner published an expanded version of his Oliver Wendell Holmes Lecture in the *Harvard Law Re-*

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[4] For discussion, RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY AND THE COMMON GOOD ch. 10 (1998).

view,[5] in which he pursues a vigorously skeptical view about the possibility of having moral discourse, at least moral discourse across cultures. One of his arguments starts with the broad definitions of the criminal law which he pronounces as vacuous from a linguistic point of view: start with the term murder, which receives the definition of the killing of a person without justification or excuse. In Posner's view, the definition offers no help at all; for once you define murder as a wrongful killing, you have not advanced the ball at all, because of the utter absence of any definition of "wrongful."[6] The tautological component found in this and other standard definitions of crimes renders the classical textual approach to the subject foolish.

I think that this counsel of despair is quite misguided. To see why, compare the analysis of murder to a parallel argument about smiles. Suppose we wanted to prove that smiling is presumptively wrong. Most of you would start to look at me as though this prescription were slightly batty. The question you would pose is why do I have to justify to anybody my decision to smile when I awake in the morning? It is a rather different task to justify killing as opposed to smiling, which is why the inquiry does take on form in dealing with the classical definitions of murder, rape, or theft as counting as unlawful killings, sexual relations, or takings. What is going on with these definitions is really this: presumptively, there is a close enough connection between generating some bad social consequences and killing another individual. For this particular action, we're going to require you to offer some powerful reason why this killing is right. We will not allow you to treat that action as a part of the general liberty in human action open to all persons, for which no further explanation is required.

Now why do we make these distinctions? Again they are made intelligible by a little armchair economics. When most people smile, they please themselves, and probably other individuals as well. So it is very difficult to isolate some deep conflict of interest between the individual who smiles and the rest of the world. To kill, rape, maim or steal, however, is to engage in actions whereby one person's gain comes at the price of somebody else's loss; for that invasion, some urgent explanation is required, lest the conduct replicate itself without end. It is not, however, impossible to think of explanations that do carry weight, given the initial concern with the preservation and advancement of human life. Self-defense is perhaps the most obvious one. But it is not the only one: capital punishment is not murder so long as the state sanctions killing as a punishment for some heinous crimes. What the definition of murder invites us to do is to argue through each of these purported justifications in ways that respect the initial impulse behind calling certain kinds of conduct presumptively wrong.

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[5] Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

[6] *Id.* at 1640-41.

Within this framework, we have to be aware of leaping over some philosophical precipice by conjuring up fantastic justifications for killing, such as those which hold that it is all right to kill other individuals who make you miserable precisely because they are happy. It is a testimony to common sense that, even with all the weirdness in human history, we have never allowed our discourse to descend to such pitiful levels. We have quite enough on our hands to deal with contested propositions that do matter. Normally, consent is not a defense to murder; in many end-of-life situations, however, respectable arguments could be made on behalf of the practice for persons in desperate pain and with no possibility of recovery from some terminal affliction.

Quite evidently, the definition of murder does not solve all these hard cases, but it does constrain the course of our inquiry. It serves as a useful guide by generating a set of successive approximations which reduce the level of confusion and ambiguity in ordinary life. The customary definitions isolate the types of conduct that require further scrutiny. Within the confines of a solid moral theory, no single proposition will answer any and all questions. To the extent that our definitions provide us with workable presumptions, they offer us insight into how a decent system of moral philosophy works. It is not a matter of pure deduction. It is not a matter of pure definition. It is a matter of successive approximations to some greater understanding of right and wrong. If certain actions were taken in self-defense, it is proper to ask whether you exceeded the justification by using excessive force. Even then, you might be free to argue that you are entitled to the benefit of the doubt: perfection is impossible, so the risk of too much force is preferable to that of too little, unless, of course, you were simply taking advantage of a crisis situation to wreak long-standing vengeance on another individual.

The system of presumptions thus generates greater richness in analysis. The complexities it reveals at each new stage tend to apply in fewer and fewer cases, which means that most practical matters can be resolved even when some theoretical loose ends remain untied. The ability to dispose of simple cases in this system does not open the door to mass indeterminacy. To the contrary, it leads to lots of dead ends for those who wish to manufacturer ingenious excuses on their own behalf. If you place your machete between the shoulder blades of some stranger walking down the street, you're not going to be able to argue self-defense, voluntary euthanasia, capital punishment or parental discipline. You are going to be charged for a clear case of murder.

Let us return to the larger theme. The skepticism that Posner shows towards the definition of murder is at root not unlike Hale's skepticism on the meaning of coercion. Both are efforts to use philosophical reasoning to undermine common understandings that find easy expression in ordinary English, and, I dare say, other languages as well. Linguistic skepticism thus cuts everyone off from ordinary discourse; it makes matters topsy-turvey. It forces us to abandon ordinary habits of speech and with it to forfeit the nourishment we usually take from everyday life. To allow your abstract ruminations to run roughshod over your deepest instincts is not a sign of good philosophy. It is rather the sign of skilled rhetoric, which will invite the suspicion of ordinary people who rely on moral judgments (including moral judgments about the proper use of legal sanctions) without any of the skeptical angst that invades the academic literature.

COGNITIVE INSTABILITY

A third attack on the usual common-sense views of human kind seeks to destabilize our view of human personality. In the course of the usual day, each of us makes countless decisions—some hard, some easy—about how we will spend our time. To be sure, we may not be happy with all the outcomes, but if you actually counted the number of cases of genuine regret after the fact, for most individuals that number would be relatively small in relation to the number of decisions made. Yet once again, the philosophical impulse is unhappy with the successes of personal integration, and throws up the principle of *incommensurability* as an obstacle to making comparisons between the different kinds of satisfactions and pleasures of the individual. The basic theme holds that the ends of individuals are so plural and diverse that it becomes incomprehensible to monetize a romantic relationship or to compare success in business with good family relations.

Now at one level the point has to be true: any time people face choices, they must think long and hard about what to do. They are also likely to go astray because they cannot take their cue from some organized market that attaches explicit prices to the various alternatives. When I decide whether to attend a play with my two sons, Benjamin and Elliot, or to work on an overdue manuscript, there is no market which facilitates the choice, even if I face the risk of social sanctions no matter which alternative I choose. I am forced to make this judgment, and do, even if it means losing some sleep and staying up late. I am hardly alone in making the hard choice to put aside the manuscript and attend the play. If that choice requires me to come home from an out-of-town trip, the price might be too high, so that family apologies are in order. By hook or crook, we all attach pluses and minuses to each alternative and muddle through: less than perfect, but better than random. Occasionally, there is deep regret, but in most cases most of us do a good job at juggling.

Philosophers, however, do not regard this as a set of practical problems to be solved by conversation, reflection and experimentation. They treat it as a fundamental obstacle to rationale discourse. They tend to resist the idea of finding a common metric (call it utility) that allows us to overcome the separability of distinct ends. This questioning of the capacity for choice in the end softens up resistance to state regulation of behavior, without ever explaining why regulators are better at making decisions for other people than people are in making decisions for themselves. A worker might think that she prefers cash to maternity leave, but once we introduce a mandatory program, then she will realize that she has made the wrong choice and come to appreciate the external requirements. Arguments of this sort strike me as a recipe for the slow loss of individual freedom and individual responsibility. I think that we should resist these new incursions of government power by insisting that our ability to make grounded decisions is often far greater than our capacity to engage in abstract discourse about how we decide. The key point here is that the feedback mechanism is much stronger as we move away from high-level generalizations; we all learn from trial and error, and it is easy to catch hell at home for making the wrong decision.

So my most unphilosophical take on this entire question runs as follows. There are easy decisions and there are hard decisions. But incommensurability is not what makes decisions either hard or easy. Rather it is the size of the stakes and the level of uncertainty that drives these difficulties. We do not face impassable problems of philosophy. We face problems that well-constructed individuals can negotiate one situation at a time, which they do in order to survive the stress and strains of everyday life. Evolution places its strong demands on us all. To move from one generation to another, someone had to decide whether to hunt or to remain at home, to work in the fields or tend to a child. Our mental hardware is adept at making these choices. As with the problems of cognition and moral judgment, the human condition is more secure than its philosophical critics make it out to be.

A MORE CONSTRUCTIVE PROGRAM: WITHOUT LIFEBOATS AND DESERT ISLANDS

In the face of all this doubt, let me indicate why I think that human regularities are understandable in most cases. We usually begin from a working assumption of individual autonomy, which can be qualified in some cases. We do so because we recognize that different people have different tastes and preferences and that these tastes and preferences cannot be simultaneously satisfied. We also recognize that requiring a lockstep progression for all individuals will necessarily limit our freedom of choice. It is as though we had to spend our entire lives going to large functions eating chicken dinners. Unfortunately, someone does not eat meat; someone does not like asparagus; someone is cutting out desserts. We tolerate standard meals when we go to certain functions because it is too costly to give people separate choices. We know that when we accept the invitation. Yet, what works for fund-raisers will not work everywhere else. As a general matter, we know that we are better off by allowing different individuals to shop at the corner grocer or the supermarket in order to select their own market basket of goods. The unbundling of choice between individuals is a great spur to human freedom and to personal satisfaction. It all rests on the simple proposition that, prima facie at least, we support a system of voluntary exchange because of the benefits it generates to the persons who participate in it.

These simple examples teach us one basic lesson. The right way to understand moral behavior and to do moral philosophy is to begin with the most routine and boring transactions to figure out why they work as well as they do. Who enters these transactions? Whom do they pair up with and why? What is their source of gain? Of risk? Only when these are understood should we tackle the difficult marginal cases that are tested in the crucible of litigation. It is a mistake to begin by looking at extreme cases. Yet the philosophical inclination is to attack the system at its weak point, before its strengths are appreciated. It is here at long last that I return to one major theme: the eagerness of philosophers to use lifeboat and desert island examples to attack the regime of market transactions and voluntary exchange. The grim outcomes are no surprise. Of course we should expect that something has to give when ten people try to squeeze onto a lifeboat that will capsize if it holds more than six. Would you want to determine who should survive and why? Or do you have any sympathy for the first to come upon a water hole in the desert who wants to exclude all those who come a second later?

Occasionally lifeboat and desert island examples arise, although it is uncertain how they play out in practice. All too often, however, wholly imaginary examples are given too much weight. One famous illustration of this risk is the well-known defense of abortion offered some time ago by Judith Jarvis Thomson,[7] who wanted to attack the pro-life forces in the abortion debate on their own grounds. Let us concede, she suggested, that the unborn fetus is a person and thus presumptively entitled to some protection. Even so, it becomes necessary to *justify* this particular intrusion on the life of the mother. So she suggested analogizing the situation to that of a woman is hooked up by some kind of elaborate pump to a famous (male) violinist. The connection was forged in the dark of night by the Society of Music Lovers who has conclusively determined that the woman is the only person with a compatible supply of blood for this patient. Disconnecting this violinist is to Thomson's mind perfectly proper, even if it kills him. Abortion, she claims, is no different. Killing it may be, but justified it is nonetheless.

A moment's reflection should instantly indicate that we have yet another example that works off the theme of monopoly and necessity. But the example is wholly contrived. It is left unexplained why only one person in the world has the right kind of blood, and why no transfusion will do the job, even if that is the case. It matters little for these purposes that the example runs counter to the universal practice in organ transplantations, which is preoccupied with the fear of coercion against organ donors in situations that do not come within light years of the current situation. But what is so utterly mystifying about the example is the idea that this impossible scenario should be used to organize our thoughts on how to treat something, pregnancy, through which all of us have gone (at least for the first half of the cycle). Nature has prepared us for this kind of monopoly, which is why the human race has survived as long as it has. But nature has also prepared us with a strong instinct for bodily integrity from external agencies which makes us recoil at the thought of this involuntary hookup. I do not understand how our intuitions are enlightened by asking us to compare pregnancy to a viscerally grotesque practice that has never taken place, and which never will take place. Our entire psychology is geared to preserve the independence of the person from external assault. But it is hardly geared to prevent the normal biological processes of pregnancy on which the survival of the species depends.

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[7] Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). This article was written before *Roe v. Wade*, 410 U.S. 113 (1973).

Thomson is right to concede that abortion involves the termination of life. But wrong to think that the violinist gives us any clue as to its possible justifications. Rather, it is instructive that the earlier debates collapsed the justifications for abortions back into classical liberal theory. It therefore recognized that *some* abortions might be justified by an appeal to self-defense, that is, as an action to save the life or health of the mother from the (innocent) aggression of the unborn fetus. There is clearly more to the abortion story than this. It is possible to extend the idea of justifiable cause to cover cases where the pregnancy is involuntary through rape, or where the fetus has some fatal condition or disease. It is possible to excuse abortion on the ground that the pregnant woman does not have the option of walking away from the unborn fetus as she could even from her own children. And it may be possible to excuse abortion by the grisly thought that so long as only the pregnant woman has the right to abort her own fetus, other women need not fear fanatical attacks on their own unborn children.

These issues cut much more to home than any contrived violinist example. Ironically, though, this brief discussion of abortion shows that our collective difficulty stems from the unhappy realization that abortion actually looks a bit like the lifeboat and the desert island: the necessary dependence of the unborn infant on the continued good will of the mother gives us no where else to turn. It is precisely in these cases that all forms of social interaction are at their most difficult, and we should learn to aim low when the set of legitimate choices is so constrained. By the same token, we should also learn never to reason backwards from the necessity and monopoly cases to the ordinary forms of market behavior that arise when the stakes are less dramatic and the choices more varied. To avoid that dreadful necessity fetish, we first have to master the simple cases. Once we grasp that trades generate mutual gains, then we could start to peer out at the exotic cases of necessity only to make some humbling discoveries. Sometimes regulation may ease the situation, but too often extreme circumstances pit too many people against each other in a race for too few goods. It was not possible for the United States to run a smooth airlift out of Saigon in 1975: someone had to wind up dead. Fortunately, we do not have to look to that experience to improve traffic flow at O'Hare Airport today.

At the margin, some small progress can be made. In the classic illustration of private necessity, I own a dock and you are caught out at sea in a small boat during a severe storm. You may have even been careless and not looked at the sky. The weather turns bad, when you come to my dock and say, "I have to moor here or I will die and my family will die with me." And I turn to you and say in reply, "This is my dock, I have the right to exclude you under the common law of property, and so if you want the moor, pay an amount that covers the forfeiture of the boat and twenty percent of your lifetime earnings." My calculation is that you will be better off because you survive, and I will be better off because the dock is worth a tiny fraction of the value of the boat and your future earnings. So the deal is struck because both of us are better off.

In order to hold you to that bargain the law would have to overlook the background conditions of necessity and focus exclusively on the short-term mutual gain. The case does not look like a supermarket purchase, because of the absence of choice. Given this holdout risk, the law says that, while trapped at sea, you may literally force your way onto the dock so long as you pay for repairs and some appropriate rental fee. As a dock owner, I am not able to take advantage of you; now, given the obligation to compensate, you can not turn around and take advantage of me. I am forced to relinquish the exclusive use of the dock. You have to pay a fee. This forced exchange is a limitation on property and a response to the risk of exploitation. The solution dovetails nicely to the ordinary condemnation of "taking advantage of someone who is over a barrel." We can now see the tension in ordinary morality when the language of advantage-taking clashes with the general prohibitions on force and fraud against the person or property of another. Putting the two points together, we can see that the deep tension in moral theory stems from the need to organize a set of rules and institutions that minimizes both these dangers simultaneously. Simply following the rule which says that no aggression is permissible makes a very good libertarian, but it also allows the dockowner to force the sailor to drown unless the latter forfeits his life earnings.

The question is how much complexity has to be introduced into the system. Here is one further wrinkle. Suppose it turns out that I need the use of my dock in order to keep myself from imminent peril. Do I, the owner, have priority by virtue of ownership over you, the stranger? The answer most people give is yes, but perhaps with a bit less confidence than in the case where cash could equalize the burdens from the loss of property. We can make matters more complicated by saying that my probability of reaching safety is 0.6 if I use the dock first while your probability of success is 0.8. Do we take into account the odds in sorting out these necessity cases? Alas, there comes a point where the uncertainties are sufficiently large to undermine our confidence in thinking our way through to the right result. At this point, we should recognize that the task will become well-nigh insuperable when many people all need to reach one dock when property rights are ill-defined and coordination is unattainable. No moral theory will overcome the dangers inherent in that situation. Yet we should not despair. We must remember that most situations do not present issues of rescue or necessity. Accordingly, we do not want to "generalize" from this case in order to allow people to routinely force themselves into the homes of other people simply because they want them very much. We have no solution for impossible situations. We only have the hope that we can forestall their occurrence in the first place by setting up in quieter times well-functioning institutions that keep these horrible situations from our doorstep.

It hardly follows that the entire enterprise is not worth undertaking because it offers no tidy, universal solution to the hardest of cases. It is important to do a good job in the common cases for which we can identify both better and worse answers. It is vital that we insulate the good work we can do in 99.9% of the real cases from the perplexities that dominate the other 0.1%. The common law system of presumptions allows one to keep the hard cases in perspective because it directs our attention to the easiest cases of aggression and promise-breaking that lie at the heart of any system of rights and wrongs. That system of successive approximation, outlined above, is run by a powerful intellectual engine, and ironically, it is one that has been picked up but not exploited in the philosophical literature. For example, W.D. Ross's philosophical standard, *The Right and the Good*,[8] with its emphasis on prima facie rights under a general theory of ethical intuitionism, echoes the starting points of the common law theory by noting the ethical intuitions for keeping promises and not hurting other people. Unless we understand the functional underpinnings of these intuitions, however, we shall not be able to navigate very far down the path to the kinds of mid-level issues that occupy so much of the law of tort, property and contract.

Perhaps an example will help here. What are the counterexamples to encouraging promise-keeping? If two dominant firms come together and agree solemnly by promise not to sell goods to their customers below a certain price, most of us would find this cartelization to be a per se violation of the antitrust law. Yet it takes more than moral theory to explain that result. We have to understand the economics of the transaction to make some stab about its effect on consumer welfare. The analysis must worry about the third party effects of individual actions. An exchange of goods from one individual to another, generally speaking, makes both of them better off, and the rest of the world will be better off to boot. The increase in overall wealth increases everyone's opportunities for trade. That is the outgrowth of an ordinary vibrant market. In contrast, however, price fixing has systematic negative effects upon consumers, whose losses will exceed the gains to the price fixers. The moral philosopher who is content to intuit or deduce what makes promises morally binding will not be able to pick up the important differences in the *content* of various promises, and will operate at a systematic disadvantage to someone with economic training, who is perfectly willing to admit to some grubby consequential justification for enforcing some promises but not others.

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[8] W.D. ROSS, THE RIGHT AND THE GOOD (1930).

So what should be done? Here I do not wish to be regarded as an "ethical noncognitivist." Rather I wish to argue for an intelligent incrementalism that builds in steps to a comprehensive moral theory that allows us to solve most problems even if it cannot solve all problems. The method of presumptions, of successive approximations, is the best way in which to reach that goal. It requires that we juggle many balls in the air at the same time; that we keep our sensitivity to ordinary intuitions, but allow them to be informed by general economic theory. It requires that we proceed by example and induction, but always in the search of some general workable rules. It requires that we recognize that, although perfection is never attainable, improvement should always be our goal.

What is so discouraging about the practice of modern philosophy is that often it does none of these things. It speaks in deductive certainties, not probabilities. It becomes extremely self-referential. It tends to ignore the role of institutions. It tends to disparage the practical wisdom of people in business and trade. It feeds itself a steady diet of one-in-a-million type of zingers that gives no clue as to how to organize routine transactions. By degrees, philosophy renders itself less philosophical and less influential than it ought to be. The best of the classical philosophers did not suffer from these limitations. They did not engage in the sort of boundary policing that marks modern philosophy. Their work had sweep and social awareness. Virtually every great philosopher begins with some assessment of the mainstreams of human motivation—that would be true of Aristotle, of Hobbes, of Locke, of Hume. Each tries to identify what rules will ensure sociability for individuals, given the strength and foibles of the human condition.

That is, in fact, the right kind of program. It is not logic chopping; it is not hair splitting; it is not linguistic skepticism; it is not staged philosophical doubt. If you keep your common sense and intellectual bearings both, then you can learn a lesson taught me by one of my own teachers at Columbia University, the late Ernest Nagel, who taught that it was more important to be right than to be clever, and that in most moral or legal disputes the right answer will be simple and straightforward. It is the thinkers with all the razzmatazz who are likely to get it wrong. So do not give up on your common sense; try to refine, improve and systematize it. That is all that we can ask of ourselves. That is what we must ask of ourselves.

PETE ROSE, BART GIAMATTI, AND THE DOWD REPORT

Ronald J. Rychlak[*]

> *"That's asking for trouble. There wouldn't be anybody you could trust. No way. I mean, you're asking to get a new job. You'd have to be the dumbest (s.o.b.) in the world to do that. You have to uphold the laws of gambling on baseball because baseball has integrity."*
>
> \- *Pete Rose, on betting on baseball.*[1]

Pete Rose, star of Cincinnati's "Big Red Machine" baseball teams that won the 1975 and 1976 World Series, collected more base hits than anyone else in the history of major league baseball.[2] Rose had the reputation as a hustling, hard-nosed, take-no-prisoners ballplayer,[3] which earned him the nickname

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[1] Jerome Holtzman, *To Mike Schmidt: There's Good Reason Rose Isn't in Hall*, CHI. TRIB., Jan. 12, 1995, at 3 (quoting Pete Rose in 1987, during his third full season as manager of Cincinnati Reds).

[2] Rose's 4,256 career base hits eclipsed the previous record of 4,191 held by Ty Cobb.

[3] This approach to the game led to a notorious collision at home plate with catcher Ray Fosse in the 12th inning of the 1970 All-Star game in Cincinnati. In one of the most famous plays in baseball history, Rose flattened Fosse, who was blocking the plate, and scored the winning run in the National League's 5-4 come-from-behind victory.

Rose missed only three games with a bruised left thigh following the collision, but Fosse was never the same player. He had entered the All-Star game hitting .313 with sixteen home runs. He hit just two more home runs the rest of the season, and his batting average fell to .268. Never again did he approach the .300 mark or hit more than twelve home runs in a full season.

"Charlie Hustle."[4] He was a hard-working everyman, greatly admired by the fans.[5] His teams played in six World Series and seven playoffs, and his list of personal accomplishments would normally make him a certain first-ballot selection to the

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Many people criticized Rose for injuring another player like this in an exhibition game, but he said:

> That's the only way I know how to play, I play to win, the way my father taught me to play. I play hurt, I play tired, I play as hard as hell. Don't tell me it's an exhibition or spring training. Don't tell me to take it easy between the white lines. That's not me, that's not my dad. If I play a charity softball game for nothing, not a dime, I go all out. Besides, nobody told me they changed it to girls softball between third and home.

Sal Maiorana, CBS SportsLine Historian (visited March 14, 1999)<http://cbs.sportsline.com/u/page/historian/allstar.htm>.

[4] T.R. Sullivan, *End Rose's 'Jail Time'*, TIMES-PICAYUNE, Aug. 17, 1997, at C1. Baseball great Micky Mantle is actually credited with having given Rose this nickname. JIM MURRAY, AN AUTOBIOGRAPHY 70 (1993).

[5] One account written by well-known baseball writer Thomas Boswell, on the occasion of Rose's 4,191st hit (tying Ty Cobb's all-time hit record), expressed a common perception of Rose.

> No veteran ever gave advice or cash more freely to rookies than Rose. No star ever took such care in sharing praise so precisely. Once Rose gave every coach on his team a free truck as a postseason gift. No reason. Just felt like it.
>
> This made Rose the most popular, admired and emulated of modern players within the game. A winner.

THOMAS BOSWELL, THE HEART OF THE ORDER 289 (1990).

> At least to one man, baseball remains a game, yet hasn't become a toy. In a season full of drug scandal and labor bluff, Rose showed that somebody still knows what the threadbare phrases "integrity of the sport" and "best interests of the game" really mean. Maybe a quarter-century of sweat teaches you more about what's right than all the books Rose never read in the college he never attended. . . . During his whole career, Rose has sworn that despite all his personal goals and self-promotion, he's never put himself ahead of his team. Now he's the team's manager to boot.

BOSWELL, *supra* at 291.

Ty Cobb's reputation, in contrast, was such that Rose, when asked whether he thought Ty was "up there looking down at you as you chase the record," responded, "From what I know about the guy, he may not be up there. He may be down there." DANIEL OKRENT & STEVE WULF, BASEBALL ANECDOTES 308 (1989). Upon breaking the record, Rose said, "Regardless of what you think, Ty *is* up there." BOSWELL, *supra*, at 293.

Baseball Hall of Fame.[6] Rose, however, is not currently in the Hall, nor is he eligible for election. In 1989, Rose and Baseball Commissioner Bart Giamatti signed an agreement in which Rose accepted permanent suspension from baseball.[7] The executive committee of the Hall of Fame thereafter voted to keep the name of any suspended player from appearing on the Hall of Fame ballot which is mailed each year to eligible members of the Baseball Writers Association.[8]

The agreement between Rose and Giamatti grew out of a controversy surrounding Baseball Rule 21(d). This rule, which is posted in all major and minor league clubhouses, provides:

> Any player, umpire or club or league official or employee who shall bet any sum whatsoever upon any baseball game in which connection the bettor has no duty to perform shall be declared ineligible for one year.
>
> Any player, umpire or club or league official or employee who shall bet any sum whatsoever on any baseball game in which the bettor has a duty to perform shall be declared permanently ineligible.[9]

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[6] In addition to total hits, Rose holds the following Major League Baseball records: most games played (3,562), most at bats (14,053), most singles (3,315), most total bases by a switch hitter (5,752), most seasons of 200 or more hits (10), most consecutive seasons with 100 or more hits (23), most seasons of 600 or more at bats (17), most seasons of 150 or more games (17), most seasons of 100 or more games (23), only player in history with more than 500 games at five different positions, and most winning games (1,972). He also holds many National League records, including: most years played (24), most consecutive years played (24), most career runs (2,165), most career doubles (746), most games with five or more hits (10), and his 44-game hitting streak in 1978 is considered the modern National League record. He was Rookie of the Year in 1963, and *The Sporting News* named him player of the decade for the 1970's.

[7] Under baseball's rules, Rose had the right to petition for readmission after one year. Major League Rule 15(c).

[8] The Hall of Fame's criteria for election state that "in addition to a player's ability and playing record, voting shall be based upon a player's 'integrity, sportsmanship, character.'" HOWARD COSELL, WHAT'S WRONG WITH SPORTS 133 (1991).

[9] *See* Rose v. Giamatti, 1989 Ohio App. LEXIS 2542 (Plaintiff-Appellee Peter E. Rose's Brief in Opposition to Defendant-Appellants' Motion for Suspension of Temporary Restraining Order Pending Appeal and for Expedited Treatment). Major League Rule 15(c) provides in relevant part:

In the 1980's, even before Bart Giamatti became commissioner, rumors that Rose was involved with professional bookies in New York and the Midwest were widespread in baseball circles.[10]

Rose was the manager of the Cincinnati Reds when he was called to the commissioner's office in February, 1989. The new commissioner, Bart Giamatti,[11] former president of Yale University, wanted Rose to explain the rumors of his gambling.[12] Rose flatly denied that he had bet on baseball or that he had any problems with bookies. Giamatti, however, felt that Rose

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> INELIGIBLE LIST.
>
> (1) A PLAYER OR OTHER PERSON found guilty of misconduct or other acts mentioned in Professional Baseball Rule 21, or convicted of a crime involving moral turpitude, may be placed on the 'Ineligible List' by the Commissioner . . . . A player or other person on the Ineligible List shall not be eligible to play or associate with any Major League or National Association Club until reinstated . . . .
>
> (2) NO MAJOR LEAGUE or National Association player shall knowingly play with or against a team with which, during the current season, any ineligible player or person has had any connection. Should a player knowingly play with or against any such team he shall thereupon be placed upon the Disqualified List.

Rose v. Giamatti, 721 F. Supp. 906, 921 n.13 (S.D. Ohio 1989). Bowie Kuhn once barred Mickey Mantle and Willie Mays, two of baseball's greatest players ever, from the game because of their employment with legal Atlantic City casinos. MURRAY, *supra* note 4, at 71-72.

[10] Investigation of Rose's alleged gambling activity began during the reign of Commissioner Peter Ueberroth, but the security section of the commissioner's office had been suspicious of him since Bowie Kuhn was commissioner. COSELL, *supra* note 8, at 123. "Everyone knew Pete was a gambler. No one knew the extent." MURRAY, *supra* note 4, at 72.

[11] Prior to becoming commissioner, Giamatti served as president of the National League. At that time, Cincinnati Reds manager Pete Rose said, "I like Bart. In fact, I get along damn good with him . . . . I think he'd make a great commissioner. He's an intellectual from Yale, but he's very intelligent." MARK HARRIS, DIAMOND: BASEBALL WRITINGS OF MARK HARRIS 225 (1994). However, Rose's opinion of Giamatti may have changed following an incident in 1988, when Rose twice shoved umpire Dave Pallone. National League President Giamatti responded with a surprisingly long thirty-day suspension and a $10,000 fine. DAVE PALLONE, BEHIND THE MASK 304-05 (1990).

[12] He had already appeared before Peter Ueberroth, the previous commissioner, to talk about such speculation. COSELL, *supra* note 8, at 123; Tim Wendel, *Why Rose Can't Enter the Hall*, USA TODAY BASEBALL WKLY., Jan. 7-13, 1998, at 20.

was lying.[13] He asked his top assistant, Fay Vincent, if he knew of someone who could conduct an investigation. Vincent immediately suggested John Dowd.

John Dowd started his professional career as a prosecutor with the justice department, where he headed a task force that built the case against Mafia kingpin Meyer Lansky.[14] Since that time he has represented several national political figures. Vincent had met Dowd several years before the Rose investigation at a trial in Virginia and had been very impressed with Dowd's abilities. Giamatti placed a call, and the next morning, Dowd and a dozen other investigators were on their way to Cincinnati to begin the Rose inquiry.[15]

Although the investigation was a team effort, John Dowd participated in every interview. Key witnesses were interviewed a minimum of three times each, and Rose himself was interviewed over the course of two days.[16]

In a very unusual procedure, particularly for a former federal prosecutor, Rose and his lawyers were permitted to see all of the evidence as it accumulated. Giamatti's idea was to let Rose answer the evidence if he could.[17] If he could not answer the evidence, Giamatti thought that Rose would eventually be overwhelmed and confess. Then they could work out a plan to provide treatment and get Rose back into baseball.[18] That is not, however, how matters worked out. Rose did not answer the evidence to Giamatti's satisfaction, nor did he confess. As such, Giamatti was left with findings from the investigation and the need to act upon them.

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[13] MURRAY, *supra* note 4, at 73.

[14] Wendel, *supra* note 12, at 20.

[15] Kevin Hallinan, baseball's chief investigator, worked closely with the Dowd investigation. He later called this case the easiest that he had ever worked on. Tim Sullivan, *Rose should cut his losses and confess*, CINCINNATI ENQUIRER, June 21, 1997, at D1 ("It was the easiest case I ever worked on. He didn't cover his tracks.")

[16] Wendel, *supra* note 12, at 20.

[17] Wendel, *supra* note 12, at 20.

[18] "If Rose had come forward, Dowd says, Giamatti 'would have sat him down for two to five years.' After that Rose could have returned to baseball. Today he would be in the Hall of Fame." Wendel, *supra* note 12, at 21.

Giamatti scheduled a hearing for June 26, 1989. Rose filed an action in the Court of Common Pleas of Hamilton County, Ohio, seeking a temporary restraining order and preliminary injunction against the pending disciplinary proceedings.[19] Named as defendants in that action were Giamatti, Major League Baseball, and the Cincinnati Reds.[20] The crux of the complaint was Rose's contention that he was being denied the right to a fair hearing by an unbiased decision maker.[21] The complaint requested permanent injunctive relief to prevent Giamatti from conducting a hearing on Rose's alleged violation of Major League Baseball Rules.

Rose won a fourteen-day temporary retraining order against the commissioner,[22] but the case was then removed to federal court.[23] The dispute was ultimately settled with the signing of an agreement, published herein for the first time, in which Rose acknowledged that "the commissioner has a factual basis to impose the penalty."[24] It was agreed that Rose would be placed on the ineligible list. His suspension would be called permanent, but he could apply for reinstatement after one year. Important to Rose, the agreement also provided that "Nothing in this agreement shall be deemed either an admission or a denial by Peter Edward Rose of the allegation that he bet on any major league baseball game."

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[19] The complaint alleged seven causes of action based upon state law claims of breach of contract, breach of an implied covenant of good faith and fair dealing, breach of fiduciary duty, promissory estoppel, interference with contract, negligence, and the common law of "due process and natural justice." Rose v. Giamatti, 1989 Ohio Misc. LEXIS 4 (Plaintiff Peter E. Rose's Motion for Temporary Restraining Order and Preliminary Injunction).

[20] The Dowd Report was the subject of some satellite litigation related to this suit, as the trial judge ordered that it be kept under seal. *See* State *ex rel.* Plain Dealer Publ'g Co. v. Hamilton County Court of Common Pleas, 542 N.E.2d 1102 (1989) (denying newspaper's request that report be unsealed).

[21] Paragraph 61 of the complaint provides:

> In light of Giamatti's actual displayed bias and outrageous conduct in this cause, his service as an investigator, a prosecutor and a prospective judge, his written prejudgment on the case before even hearing from Pete Rose and all of the evidence to be offered, and his denial of the procedural rights guaranteed to Pete Rose under the Rules of Procedure and the various contracts herein involved, Pete Rose will suffer irreparable injury if Giamatti is allowed to conduct the hearing. To submit to such a fatally flawed process would guarantee that Pete Rose would not receive a fair hearing, and he would be irrevocably tainted by Giamatti's continuing to pursue his various roles in this proceeding and his prejudging of the case.

Rose v. Giamatti, 721 F. Supp. 906, 915 (S.D. Ohio 1989).

[22] Rose v. Giamatti, 1989 Ohio Misc. LEXIS 1 (issuance of TRO); Rose v. Giamatti, 1989 Ohio App. LEXIS 2542 (Plaintiff-Appellee Peter E. Rose's Brief in Opposition to Defendant-Appellants' Motion for Suspension of Temporary Restraining Order Pending Appeal and for Expedited Treatment); Rose v. Giamatti, 1989 Ohio Misc. LEXIS 2533 (granting Rose's motion to dismiss challenge to the TRO).

The commissioner's official announcement of the agreement, published herein, became a point of controversy when it was followed by a question and answer session. The first question at the news conference was, "Did Rose bet on baseball?" Giamatti began, "In the absence of a hearing and therefore in the absence of evidence to the contrary . . . ." After a pause, Giamatti said, "I am confronted by the factual record of Mr. Dowd. On the basis of that, yes, I have concluded he bet on baseball."[25] Rose felt that he had been betrayed. Eight days later, Commissioner Giamatti died of a heart attack. As one sportswriter noted, "Victor Hugo would have loved the Bart Giamatti-Pete Rose epic. It had everything *Les Miserables* had except the bishop's candlesticks."[26]

The report on Major League Baseball's case against Pete Rose, commonly known as the "Dowd Report," was presented to Commissioner Giamatti on May 9, 1989.[27] It has been a regular source of debate for baseball players, historians, and commentators ever since. The full report, however, has not previously published in full.

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[23] Rose v. Giamatti, 721 F. Supp. 906 (S.D. Ohio 1989).

[24] In a private conversation on the night of the signing of the agreement, Giamatti said, "We are ridding baseball of a cancer. I am proud that we are able to uphold the integrity of the game." COSELL, *supra* note 8, at 125. He was not happy that Rose could apply for reinstatement after a one-year period, but that was part of Rule 21 (d), on which the agreement was based. *Id.* Despite this provision, in fourteen previous such banishments, not one reinstatement had taken place. MURRAY, *supra* note 4, at 78.

[25] Wendel, *supra* note 12, at 22.

[26] MURRAY, *supra* note 4, at 72.

[27] Rose v. Giamatti, 721 F. Supp. 906, 909 (S.D. Ohio 1989).

Baseball writer Thomas Boswell has written that "the voluminous Dowd Report still stands like a boulder at the door of the Hall of Fame to keep Rose out."[28] The late Howard Cosell wrote that the Dowd Report makes "clear to anyone with an open mind that Rose not only bet on baseball, but bet on his own team."[29] Peter Gammons, a writer for The Boston Globe, but perhaps better known for his work as an ESPN baseball analyst, has written that before Rose could be reinstated, he "has to prove that something has changed—because he can't have it both ways—and allow public scrutiny of the Dowd Report."[30]

Several Hall of Fame inductees are on record saying that they would not go back to Cooperstown for induction ceremonies if Rose is voted into the Hall,[31] and most of them have little to go on other than the Dowd Report. The Dowd Report has even changed the attitudes of some who were close to Rose. At least one writer reported that he saw Rose do "many things in my presence, things which meant nothing to me at the time, but became clear after I read baseball investigator John Dowd's report."[32]

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[28] Thomas Boswell, *Reassessing Our Convictions*, WASH. POST, Jan. 28, 1998, at C1.

[29] COSELL, *supra* note 8, at 121.

[30] Peter Gammons, *It's curtain time for great theater*, BOSTON GLOBE, Sept. 28, 1997, at E6.

[31] Hal McCoy, *It's Time to Forgive Pete Rose*, DAYTON DAILY NEWS, September 12, 1997, at D1 (stating that "a large contingent of current Hall of Famers [including Johnny Bench] . . . are on record as saying they'd never go back to Cooperstown for induction ceremonies if Rose is voted in"). Baseball great Ted Williams has been quoted to the effect that many Hall of Famers would boycott annual Cooperstown events if Rose were admitted to the Hall. "Even though they like Pete, even though they're fond of him as a ballplayer, these guys draw a line." Mike Bass, *Rose critics want confession, apology*, CINCINNATI POST, Sept. 12, 1997, at A1. Many current players are also unwilling to overlook evidence of Rose's gambling. Steve Hummer, *Come clean, Pete. Doors may open*, ATLANTA JOURNAL & CONST., Sept. 13, 1997, at E2 (quoting Tom Glavine, Fred McGriff, and other unnamed Atlanta Braves).

Opinion polls regularly reflect that Pete still has tremendous support among baseball fans, who would like to see him in the Hall of Fame. *See, e.g.*, *Baseball Digest Poll Favors Reinstatement of Pete Rose*, BASEBALL DIGEST, Mar. 1998, at 22. A former teammate of Rose and a Hall of Famer himself, Mike Schmidt, has called for Rose's induction to the Hall. *See* Holtzman, *supra* note 1, at 3. Former President Jimmy Carter has even written a call for Rose's admission to the Hall of Fame. *See* Jimmy Carter, *It's Time to Forgive Pete Rose*, USA TODAY, Oct. 30, 1995, at A13.

Perhaps Rose's strongest defender is baseball statistician Bill James, best known for writing and editing the *Baseball Abstract* from 1977 through 1988. James has written that "Rose got a raw deal from baseball,"[33] and that the Dowd Report "which claimed to be fair and impartial, was a mockery of those words."[34] James also wrote:

> If Pete Rose ever sues baseball seeking to nullify the agreement he made with Giamatti, under which he agreed to accept a lifetime ban, he absolutely will win, and baseball will be ordered to remove him from their disqualified list, and to compensate him for the time he has spent there.[35]

In addition to arguing that baseball did not negotiate in good faith with Rose, James argues that Giamatti breached the agreement by announcing his opinion that Rose had bet on baseball.[36]

Rose has always denied betting on baseball,[37] and he has called the Dowd Report "a pack of lies."[38] He has also argued that he was treated unfairly, especially compared to players who have had drug abuse problems.[39] At the height of the scandal, Rose promised to someday give his side of the story. He repeated his desire to do so at a news conference on the day Bart Giamatti banned him from baseball. Presumably, this was to come with publication of his book, *Pete Rose: My Story*. Noted baseball writer Roger Kahn was selected to co-author the book with him, and it was a sympathetic look at Rose. It did not, however, answer most of the gambling questions.[40] The week before the book was released, Rose told the Associated Press, "I'm no longer interested in telling my side of the gambling scandal that led to my ban from baseball."[41] As Howard Cosell wrote: "[The] publisher, Macmillan, promised that Rose would provide answers to heretofore unanswered questions, but there were no answers."[42] In fact, when it became clear that Rose was not being candid with Kahn about the gambling issues, Macmillan threatened to cancel the book and reportedly considered legal action against Rose.[43]

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[32] McCoy, *supra* note 31, at D1. *See* PAT SUMMERALL & JIM MOSKOVITZ, PAT SUMMERALL'S SPORTS IN AMERICA 238 (1996) (stating that "everybody—including people who know him well—thinks Rose bet on baseball games").

[33] BILL JAMES, THE POLITICS OF GLORY: HOW BASEBALL'S HALL OF FAME REALLY WORKS 355 (1994).

[34] *Id.* It should be noted that the Dowd Report has not been subjected to the scrutiny of cross examination that normally proceeds a judicial opinion. Dowd built a case and offered Rose the opportunity to address the issues, but Rose settled the case rather than participating in a hearing where he could have introduced evidence.

[35] *Id.*

[36] *Id.*

[37] In fact, Rose has stated: "I'm a firm believer in this: if I bet on baseball, I shouldn't be allowed in baseball. I agree with that rule." SUMMERALL & MOSKOVITZ, *supra* note 32, at 251.

[38] Larry Stewart, *College Fans Must Pay for ABC Decision*, L.A. TIMES, Nov. 7, 1997, at C6.

In the book, Kahn almost scoffed at his friends who warned him that he would lose credibility by writing Rose's story. Unfortunately, that is exactly what happened. On April 23, 1990, he told Howard Cosell:

> I was blatantly misled by Rose and others who were associated with Rose, in regards to Pete's tax situation and his gambling. Pete didn't want an honest book. There was a dark side. He was simply looking for quick cash to pay debts. What they really wanted was a self-serving book which would help Rose gain admission to the Hall of Fame.[44]

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[39] SUMMERALL & MOSKOVITZ, *supra* note 32, at 251 ("It just seems like if you have a drug problem, you get four or five chances. If you have a gambling problem, you only get one chance, one chance and out of here.").

[40] "On the day that Rose agreed not to contest Giamatti's lifetime suspension for misconduct related to gambling, he said he would soon tell his side. We're still waiting." Bill Koch, *Welcome Rose Back, but Not in Uniform*, PITTSBURGH POST-GAZETTE, Sept. 14, 1997, at D5.

[41] COSELL, *supra* note 8, at 127.

[42] *Id.* at 126.

[43] *Id.* at 126-27.

[44] *Id.* at 126.

Kahn concluded by saying, "I'm concerned about what the Rose book did to my credibility. It surely didn't help it. I hope people will forget my involvement with the Pete Rose book and remember me for *The Boys of Summer*."[45]

About the most that Rose's book did to advance his case was to question the credibility of some of the witnesses relied upon in the Dowd Report. Thus, it has been written that "Dowd's report was largely based on the testimony of punks and wannabes."[46] Rose's closest friends were a collection of hustlers with questionable character who were themselves facing various charges of gambling, tax evasion, and drugs.[47] Most of them had severe credibility problems, and by agreeing to cooperate with baseball's investigation, they hoped to receive favorable treatment from judges in charges that they were then facing. In particular, Ron Peters sought and obtained a letter from Giamatti to the judge in his case indicating that he had been "candid, forthright and truthful" as he cooperated in baseball's investigation of Rose.[48] Rose's lawyers argued that this letter showed both Peters' lack of credibility and Giamatti's partiality.[49]

Rose's efforts to damage the credibility of his accusers were limited by his own criminal law problems. On April 19, 1990, he pleaded guilty on two counts of knowingly filing false income tax returns by failing to report nearly $350,000 in income from gambling, autograph signing, and baseball memorabilia sales, in violation of 26 U.S.C. § 7206(1).[50] He owed taxes of $162,703 before interest and penalties. When he entered his guilty plea, Rose paid the back taxes, $66,984 in interest, and $129,715.25 in penalties. He faced a possible $500,000 fine, plus a jail sentence of up to six years, but after plea bargaining,[51] the judge gave Rose five months in jail, followed by three months in a halfway house and a fine of $50,000.

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[45] *Id.* at 127.

[46] Philip Martin, *A Baseball Legend of Cartoon Proportions*, ARK. DEMOCRAT-GAZETTE, Aug. 6, 1995, at 2J.

[47] "Pete wasn't exactly lunching with [Mafia Godfather] John Gotti. But he was close to it." MURRAY, *supra* note 4, at 74. Rose himself said, "It's all I'm guilty of—picking my friends stupidly." *Id.* at 77.

[48] Rose v. Giamatti, 1989 Ohio App. LEXIS 2542 (Plaintiff-Appellee Peter E. Rose's Brief in Opposition to Defendant-Appellants' Motion for Suspension of Temporary Restraining Order Pending Appeal and for Expedited Treatment). Peters is an ex-bookmaker who claims to have taken baseball bets from Rose. He served eighteen months in a minimum-security institution for tax evasion and cocaine distribution.

[49] *Id.*

Rose has now petitioned for reinstatement, but his prospects are not good at this time.[52] Commissioner Bud Selig (then an acting commissioner) said in 1995: "Bart Giamatti was one of the best friends I've ever had in the world, and I have great faith in his decision. His decision still stands, and as far as I'm concerned, his decision should stand."[53] No convicted felon has ever been admitted to the Baseball Hall of Fame. Moreover, "Pete Rose has done nothing to change the conditions under which he asked out of the game—no rehab, no admissions of altering his pitching staff for nights he bet on the Reds."[54] In fact, Rose seems to have violated the terms of his ban from baseball by addressing minor leaguers at the Cincinnati Reds' camp during spring training in 1998.[55]

Former commissioner Fay Vincent also opposes Rose's reinstatement, because his banishment may deter other players from gambling. He suggests that Rose's statistics should not cause his wrongdoing to be overlooked. "Are we saying great players should be reinstated but .220-hitting catchers and third-base coaches shouldn't be? Do you have one set of rules if somebody is a good player and another set of rules if somebody is not?"[56] Vincent even has some evidence to support his position. Former all-star outfielder Lenny Dykstra had his own gambling-related problems in the 1980's, but he stopped gambling in 1989. When asked by John Dowd why he quit, he responded: "Because when you guys got Rose, I shut it down."[57]

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[50] United States v. Rose, 1990 U.S. Dist. LEXIS 4170. *See* MURRAY, *supra* note 4, at 75.

[51] United States v. Rose, 1990 U.S. Dist. LEXIS 4170.

[52] Koch, *supra* note 40, at D5; Frank Luksa, *Integrity should be in Hall, not Shoeless Joe, Rose*, DALLAS MORNING NEWS, Mar. 3, 1998, at 3B.

[53] Sullivan, *supra* note 15, at D1.

[54] Gammons, *supra* note 30, at E6.

[55] Tom Haudricourt, *Murdoch vote should be a grudging 'yes': Sale of Dodgers could be approved by Thursday*, MILWAUKEE JOURNAL SENTINEL, Mar. 15, 1998, at 4. The greatest threat to Rose's dream of being in the Hall of Fame may well be in evidence that was uncovered after his banishment. A betting book seized by United States postal inspectors in a raid on "Hit King Marketing" in Staten Island, New York, in October, 1989 is reportedly more damaging than any other evidence concerning Rose's betting on baseball. John Erardi, *'Smoking Gun' alleged in Rose case; Hall of Fame spot appears a long shot*, CINCINNATI ENQUIRER, Aug. 21, 1994, at A1. There have also been new witnesses who have come forward since 1989. *Id.*

Whether the debate focuses on deterrence, credibility, the weight of the evidence, or simple justice, the evidence must be made available. Pitching great Tom Seaver, a former teammate of Rose, said that baseball needs to reveal its evidence against Rose:

> That's the only way Pete's going to get reinstated. Right now, there's this cloud of guilt hanging over him because of the way the lawyers handled his case. If he bet on baseball games and they have the proof, they should reveal it so that Pete can say he's sorry and begin a three-year suspension process or whatever. Otherwise, if there is no proof, he should be reinstated right away.[58]

An unnamed Atlanta Brave said there should be at least one condition for Rose's reinstatement—that all the evidence that went into the Dowd Report be laid out for public inspection.[59]

We hope that the following documents—the Dowd Report, the agreement between Rose and Major League Baseball, and Commissioner Giamatti's statement—will finally bring the evidence to light and be beneficial to others who study this subject in the future. It is fair to say that the Rose case was the most debated litigation involving a sports figure ever, until the O.J. Simpson case. The evidence, however, has never before been available for public inspection. The *Mississippi Law Journal* and the University of Mississippi School of Law are delighted to be part of the process that makes this information available for public inspection.

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[56] *Id.*

[57] *Id.*

[58] Bill Madden, *Seaver: Tell Us Truth on Rose*, N.Y. DAILY NEWS, July 31, 1995, at 43.

[59] Hummer, *supra* note 31, at E2.

OFFICE OF THE COMMISSIONER MAJOR LEAGUE BASEBALL

STATEMENT OF COMMISSIONER A. BARTLETT GIAMATTI

August 24, 1989

The banishment for life of Pete Rose from baseball is the sad end of a sorry episode. One of the game's greatest players has engaged in a variety of acts which have stained the game, and he must now live with the consequences of those acts. By choosing not to come to a hearing before me, and by choosing not to proffer any testimony or evidence contrary to the evidence and information contained in the report of the Special Counsel to the Commissioner, Mr. Rose has accepted baseball's ultimate sanction, lifetime ineligibility.

This sorry episode began last February when baseball received firm allegations that Mr. Rose bet on baseball games and on the Reds' games. Such grave charges could not and must never be ignored. Accordingly, I engaged and Mr. Ueberroth appointed John Dowd as Special Counsel to investigate these and any other allegations that might arise and to pursue the truth wherever it took him. I believed then and believe now that such a process, whereby an experienced professional inquires on behalf of the Commissioner as the Commissioner's agent, is fair and appropriate. To pretend that serious charges of any kind can be responsibly examined by a Commissioner alone fails to recognize the necessity to bring professionalism and fairness to any examination and the complexity a private entity encounters when, without judicial or legal powers, it pursues allegations in the complex, real world.

Baseball had never before undertaken such a process because there had not been such grave allegations since the time of Landis. If one is responsible for protecting the integrity of the game of baseball—that is, the game's authenticity, honesty and coherence—then the process one uses to protect the integrity of baseball must itself embody that integrity. I sought by means of a Special Counsel of proven professionalism and integrity, who was obliged to keep the subject of the investigation and his representatives informed about key information, to create a mechanism whereby the integrity we sought to protect was itself never violated. Similarly, in writing to Mr. Rose on May 11, I designed, as is my responsibility, a set of procedures for a hearing that would have afforded him every opportunity to present statements or testimony of witnesses or any other evidence he saw fit to answer the information and evidence presented in the Report of the Special Counsel and its accompanying materials.

That Mr. Rose and his counsel chose to pursue a course in the courts rather than appear at hearings scheduled for May 25 and then June 26, and then chose to come forward with a stated desire to settle this matter is now well known to all. My purpose in recounting the process and the procedures animating that process is to make two points that the American public deserves to know:

First, that the integrity of the game cannot be defended except by a process that itself embodies integrity and fairness;

Second, should any other occasion arise where charges are made or acts are said to be committed that are contrary to the interests of the game or that undermine the integrity of baseball, I fully intend to use such a process and procedure to get to the truth and, if need be, to root out offending behavior. I intend to use, in short, every lawful and ethical means to defend and protect the game.

I say this so that there may be no doubt about where I stand or why I stand there. I believe baseball is a beautiful and exciting game, loved by millions—I among them—and I believe baseball is an important, enduring American institution. It must assert and aspire to the highest principles—of integrity, of professionalism of performance, of fair play within its rules. It will come as no surprise that like any institution composed of human beings, this institution will not always fulfill its highest aspirations. I know of no earthly institution that does. But this one, because it is so much a part of our history as a people and because it has such a purchase on our national soul, has an obligation to the people for whom it is played—to its fans and well-wishers—to strive for excellence in all things and to promote the highest ideals.

I will be told that I am an idealist. I hope so. I will continue to locate ideals I hold for myself and for my country in the national game as well as in other of our national institutions. And while there will be debate and dissent about this or that or another occurrence on or off the field, and while the game's nobler parts will always be enmeshed in the human frailties of those who, whatever their role, have stewardship of this game, let there be no doubt or dissent about our goals for baseball or our dedication to it. Nor about our vigilance and vigor—and patience—in protecting the game from blemish or stain or disgrace.

The matter of Mr. Rose is now closed. It will be debated and discussed. Let no one think that it did not hurt baseball. That hurt will pass, however, as the great glory of the game asserts itself and a resilient institution goes forward. Let it also be clear that no individual is superior to the game.

OFFICE OF THE COMMISSIONER OF BASEBALL
350 PARK AVENUE
NEW YORK, NEW YORK

In the Matter of:

Peter Edward Rose, Manager,
Cincinnati Reds Baseball Club

AGREEMENT AND RESOLUTION

On March 6, 1989, the Commissioner of Baseball instituted an investigation of Peter Edward Rose, the field manager of the Cincinnati Reds Baseball Club, concerning allegations that Peter Edward Rose engaged in conduct not in the best interests of baseball in violation of Major League Rule 21, including but not limited to betting on Major League Baseball games in connection with which he had a duty to perform.

The Commissioner engaged a special counsel to conduct a full, fair and confidential inquiry of the allegations against Peter Edward Rose. Peter Edward Rose was given notice of the allegations and he and his counsel were generally apprised of the nature and progress of the investigation. During the inquiry, Peter Edward Rose produced documents, gave handwriting exemplars and responded to questions under oath upon oral deposition. During the deposition, the special counsel revealed key evidence gathered in the inquiry to Peter Edward Rose and his counsel.

On May 9, 1989, the special counsel provided a 225-page report, accompanied by seven volumes of exhibits, to the Commissioner. On May 11, 1989, the Commissioner provided a copy of the Report and exhibits to Peter Edward Rose and his counsel, and scheduled a hearing on May 25, 1989 to give Peter Edward Rose an opportunity to respond formally to the information in the report. Peter Edward Rose received, read and is aware of the contents of the Report. On May 19, 1989, Peter Edward Rose requested, and subsequently received, an extension of the hearing date until June 26, 1989. Peter Edward Rose acknowledges that the Commissioner has treated him fairly in this Agreement and has acted in good faith throughout the course of the investigation and proceedings.

Peter Edward Rose will conclude these proceedings before the Commissioner without a hearing and the Commissioner will not make any formal findings or determinations on any matter including without limitation the allegation that Peter Edward Rose bet on any Major League Baseball game. The Commissioner has determined that the best interests of Baseball are served by a resolution of this matter and on the following agreed upon terms and conditions:

1. Peter Edward Rose recognizes, agrees and submits to the sole and exclusive jurisdiction of the Commissioner:

   A. To investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball; and

   B. To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action as the case may be.

2. Counsel for Peter Edward Rose, upon his authority, have executed a Stipulation dismissing with prejudice the civil action that was originally filed in the Court of Common Pleas, Hamilton County Ohio, captioned *Peter Edward Rose v. A. Bartlett Giamatti*, No. A8905178, and subsequently removed to the United States District Court from the Southern District of Ohio, Eastern Division, Docket No. C-2-89-577.

3. Peter Edward Rose will not avail himself of the opportunity to participate in a hearing concerning the allegations against him, or otherwise offer any defense to those allegations.

4. Peter Edward Rose acknowledges that the Commissioner has a factual basis to impose the penalty provided herein, and hereby accepts the penalty imposed on him by the Commissioner and agrees not to challenge that penalty in court or otherwise. He also agrees he will not institute any legal proceedings of any nature against the Commissioner or any of his representatives, either Major League or any Major League Club.

5. The Commissioner recognizes and agrees that it is in the best interests of the national game of Baseball that this matter be resolved pursuant to his sole and exclusive authority under the Major League Agreement.

THEREFORE, the Commissioner, recognizing the benefits to Baseball from a resolution of this matter, orders and directs that Peter Edward Rose be subject to the following disciplinary sanctions, and Peter Edward Rose, recognizing the sole and exclusive authority of the Commissioner and that it is in his interest to resolve this matter without further proceedings, agrees to accept the following disciplinary sanctions imposed by the Commissioner:

a. Peter Edward Rose is hereby declared permanently ineligible in accordance with Major League Rule 21 and placed on the Ineligible List.

b. Nothing in this Agreement shall deprive Peter Edward Rose of the rights under Major League Rule 15(c) to apply for reinstatement. Peter Edward Rose agrees not to challenge, appeal or otherwise contest the decision of, or the procedure employed by, the Commissioner or any future Commissioner in the evaluation of any application for Reinstatement.

c. Nothing in this agreement shall be deemed either an admission or a denial by Peter Edward Rose of the allegation that he bet on any Major League Baseball game.

Neither the Commissioner nor Peter Edward Rose shall be prevented by this agreement from making any public statement relating to this matter so long as no such public statement contradicts the terms of this agreement and resolution.

This document contains the entire agreement of the parties and represents the entire resolution of the matter of Peter Edward Rose before the Commissioner.

Agreed to and resolved this 23rd day of August 1989,

______________________	______________________
Peter Edward Rose	A. Bartlett Giamatti Commissioner of Baseball

CONFIDENTIAL

OFFICE OF THE COMMISSIONER
MAJOR LEAGUE BASEBALL
350 PARK AVENUE
NEW YORK, NEW YORK*

In the Matter of:
Peter Edward Rose, Manager,
Cincinnati Reds Baseball Club

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* The only intended difference between this version of the Dowd Report and the original is the page numbering. However, the *Mississippi Law Journal* assumes no responsibility for errors or omissions. Exhibits referred to in this report may be found in John Dowd's office, the Commissioner's office, and the Baseball Hall of Fame in Cooperstown, New York.

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REPORT TO THE COMMISSIONER

I. INTRODUCTION

On February 23, 1989, this firm was retained and empowered by the Office of the Commissioner[1] to investigate Peter Edward Rose, the Manager of the Cincinnati Reds Baseball Club, pursuant to the Major League Baseball Agreement.[2] Your decision was based on the fact that the Director of Security for Major League Baseball had received reports during the past year that Pete Rose had bet on Major League Baseball games, including games of the Cincinnati Reds, in violation of Major League Rule 21. Rule 21(d) provides:

> Any player, umpire, or club or league official or employee, who shall bet any sum whatsoever upon any baseball game in connection with which the bettor has no duty to perform, shall be declared ineligible for one year.
>
> Any player, umpire, or club or league official or employee, who shall bet any sum whatsoever upon any baseball game in

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[1] Peter Ueberroth was Commissioner until March 31, 1989. On April 1, 1989, A. Bartlett Giamatti became Commissioner.

[2] Article I, Section 2 of the Major League Agreement empowers the Commissioner to, *inter alia*:

> - investigate . . . any act, transaction or practice charged, alleged or suspected to be not in the best interests of . . . Baseball.
> - determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Club or individuals, as the case may be.
> - formulate . . . the rules of procedure to be observed by the Commissioner and all other parties in connection with the discharge of his duties. Such rules shall always recognize the right of any party in the interest to appear before the Commissioner and be heard.

> connection with which the bettor has a duty to perform shall be declared permanently ineligible.

Betting on baseball by a participant of the game is corrupt because it erodes and destroys the integrity of the game of baseball. Betting also exposes the game to the influence of forces who seek to control the game to their own ends. Betting on one's own team gives rise to the ultimate conflict of interest in which the individual player/bettor places his personal financial interest above the interests of the team.

Gambling is conducted in secret by its participants. Normally little is recorded and what is written down is destroyed shortly after payment of the wager. Payments are often made in cash by runners between the bookmaker and the gambler because cash is fungible and difficult to trace. The runners provide insulation and, thus, deniability to the gambler and the bookmaker. The telephone is used to conduct the wagering business by the participants. It is often difficult to determine who is wagering with whom because many phones are used by the bookmaker, runners and gamblers. The product of gambling—particularly sports action—is debt—enormous debt which leads to obligations, which leads to corruption.

The secret gambling enterprise is typically exposed only when a participant is apprehended and begins to cooperate with the authorities. The difficulty for the investigator lies in the gathering of corroborative evidence. The gambling enterprise is designed to leave few tracks, and upon exposure, to provide alibis to the participants.

II. Summary of Report

As detailed more extensively herein, Pete Rose has denied under oath ever betting on Major League Baseball or associating with anyone who bet on Major League Baseball. However, the investigation has developed evidence to the contrary. The testimony and the documentary evidence gathered in the course of the investigation demonstrates that Pete Rose bet on baseball, and in particular, on games of the Cincinnati Reds Baseball Club, during the 1985, 1986 and 1987 seasons.[3]

The evidence showed that with few exceptions, Rose did not deal directly with bookmakers but rather placed his bets through others. As discussed in Section III, during the 1985 and 1986 seasons, Rose placed bets on baseball with Ron Peters, a bookmaker in Franklin, Ohio. Although Rose placed his bets with Peters primarily through Tommy Gioiosa, on several occasions Rose placed bets on baseball games, including Cincinnati Reds games, directly with Peters. Rose's dealings with Gioiosa, and ultimately with Peters, are corroborated by the testimony of others and by Rose's own financial records as well. Rose admitted placing bets with Gioiosa on football and basketball games, but denied placing any bets on baseball games.

The evidence also showed that Rose placed bets through another friend, Michael Bertolini. Bertolini, in turn, placed bets on Rose's behalf with an unidentified bookmaker in New York City. One source of this information is a 1988 tape recorded conversation between Bertolini and another of Rose's associates, Paul Janszen. During that conversation, Bertolini mentioned, among other things, that Rose had incurred substantial debts to Bertolini and the New York bookmaker and that Rose had given Bertolini personal checks which Bertolini had had cashed and the proceeds sent to the New York bookmaker. Rose's financial records reveal checks in the amounts described by Bertolini, made out by Rose to fictitious payees. Rose denied placing bets with Bertolini and denied owing anyone money. Rose acknowledged sending eleven $8,000 checks to Bertolini made out to fictitious payees but said that these checks were loans to Bertolini to be used as payments to athletes for baseball card shows.

During the 1987 baseball season, Rose utilized Paul Janszen to place his baseball bets after Rose and Gioiosa had a falling out in the spring of 1987. Janszen relayed Rose's baseball bets to an acquaintance of Rose, Steve Chevashore, who in turn placed Rose's bets with a bookmaker in Staten Island,

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[3] No evidence was discovered that Rose bet against the Cincinnati Reds.

New York, identified only as "Val." Rose's betting on professional baseball, including Reds games, was testified to by Janszen and his girlfriend, Danita Marcum, and was discussed during a taped telephone conversation between Janszen and Chevashore. Rose's betting on baseball is further corroborated by betting records from Rose's home which have been identified by an expert as being in Rose's handwriting. Rose has denied ever placing any bets with Janszen at any time.

In May 1987, "Val" refused to accept bets on behalf of Rose due to Rose's failure to pay his gambling debts. Thereafter, Rose's baseball bets were again placed with Ron Peters. However, instead of being placed by Gioiosa, Rose's bets were placed with Peters by Paul Janszen. Between May and July 1987, Rose bet with Peters $2,000 per game on baseball, including Reds games. Rose's betting on baseball was also witnessed by Jim Procter and Dave Bernstein who were acquaintances of Janszen.

Section IV analyzes the documentary evidence, including Pete Rose's betting sheets, the betting notebook maintained by Paul Janszen, and the betting records of Ron Peters. These documents have been analyzed by an expert in gambling investigations who has verified that they reflect actual games played and actual betting lines.

Finally, Section V summarizes the 1987 betting activity, incorporating information from the betting sheets and telephone traffic between Rose, Janszen, Chevashore, "Val" and Peters between April 8, 1987 and July 5, 1987. As stated by the gambling expert, telephone records indicating short but frequent telephone calls to and from bettors, and to bookmakers, are indicative of professional betting activity. In addition, the timing of the calls also lends further corroboration to the statements of the witnesses questioned during the investigation.

Thus, in sum, the accumulated testimony of witnesses, together with the documentary evidence and telephone records reveal extensive betting activity by Pete Rose in connection with professional baseball and, in particular, Cincinnati Reds games, during the 1985, 1986 and 1987 baseball seasons.

III. RESULTS OF INVESTIGATION

A. The Rose-Gioiosa-Peters Betting—1985 and 1986

In 1978, Pete Rose befriended a young man from New Bedford, Massachusetts, named Tommy Gioiosa (also known as Tommy Gio).[4] Rose was introduced to Gioiosa by his son, Pete Rose II, in Florida during Spring training where Gioiosa was playing in a community college baseball tournament. Gioiosa became, over the next few years, a constant companion and runner for Pete Rose. Gioiosa moved in with Rose and his family in 1978 and, after Rose was divorced on July 31, 1980, he moved into a condominium with Rose.[5] Rose added that "[Gioiosa] paid no rent; he didn't have to buy food; and I let him drive one of my cars."[6]

The evidence uncovered during the investigation revealed that Gioiosa started running bets for Pete Rose in the fall of 1984, several months after Gold's Gym opened in suburban Cincinnati, Ohio, on June 1, 1984. Michael Fry was the owner of Body Power, Incorporated, doing business as Gold's Gym.[7] Donald Stenger, an investor of $25,000 in the gym and the Vice President of Body Power, Incorporated, was a good friend of Pete Rose.[8] Don Stenger introduced Tommy Gioiosa, who claimed to have prior experience in the management of health clubs, to Mike Fry.[9] Gioiosa and Stenger began regularly working out at Gold's Gym around September of 1984.[10] Around November 1984, Gioiosa and Stenger began to bring Pete Rose to Gold's Gym.[11] Gioiosa and Stenger became critical of the operation of the gym, and as a result, Gioiosa became the manager of the gym around February 1985.[12] He ran the gym with the assistance of Don Stenger and Linda Kettle.[13]

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[4] Tommy Gioiosa has declined upon advice of counsel to cooperate in this investigation. Letter to Thomas Gioiosa from John Dowd, March 30, 1989. *See* Exhibit 1.

[5] Peter Rose Deposition, April 20-21, 1989, at 123. *See* Exhibit 2.

[6] Rose Dep. at 123.

[7] Transcript of Michael Fry Interview, April 11, 1989, at 2-3. *See* Exhibit 3.

[8] Fry Interview at 2-3, 5-7. Rose denied that Stenger was his friend. Rose Dep. at 308.

[9] Fry Interview at 4.

[10] Fry Interview at 5.

[11] Fry Interview at 5.

James Eveslage, who runs the Miami Beach Tanning Salon in Oxford, Ohio, was a member of Gold's Gym and had known Don Stenger for eight years prior to the opening of Gold's Gym.

Stenger told us that Gioiosa once asked him if he knew someone who could take bets. Stenger thereupon introduced Gioiosa to Jim Eveslage.[14] Eveslage recalled that Gioiosa approached him and asked if he, Eveslage, knew of anyone who could take "big action" for Pete Rose.[15] Gioiosa told Eveslage that he wanted to "lay down" bets on football for Rose.[16] Eveslage was aware that Rose and Gioiosa were associated because he had seen them together on occasion.[17] Eveslage also knew that Gioiosa was a gambler who made bets on all types of sports activities.[18] Eveslage told Gioiosa that he would give him the name of someone who could handle his betting action.[19]

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[12] Fry Interview at 6.

[13] Stenger, Kettle and Gioiosa quit Gold's Gym in March of 1985 over a dispute with Fry. Fry Interview at 9-11. Gioiosa, however, returned as manager of Gold's Gym in September of 1985. Fry Interview at 13.

Stenger, Kettle and Fry were indicted and entered guilty pleas as a result of a government investigation into a cocaine distribution business operating between Florida and Ohio. Specifically,

- Don Stenger pled guilty to one count of Conspiracy to Distribute Cocaine, and one count of Tax Evasion, and was, on March 24, 1989, sentenced to eight years imprisonment. *See* Exhibit 4.
- Linda Kettle pled guilty to one count of Conspiracy to Distribute Cocaine, and on March 24, 1989, was sentenced to four years imprisonment. *See* Exhibit 5.
- Michael Fry pled guilty to one count of Possession With Intent to Distribute Cocaine and one count of Filing a False Income Tax Return, and on March 8, 1989, was sentenced to eight years on the first count, and two years on the second count, with the sentences to run concurrently. *See* Exhibit 6.
- Thomas Gioiosa, on April 6, 1989, was indicted by a federal grand jury for the Southern District of Ohio for one count of Conspiracy to Distribute Cocaine, two counts of Tax Evasion, one count of Filing a False Income Tax Return, and one count of Conspiracy to Defraud the United States. *See* Exhibit 7.

[14] Memorandum of Donald Stenger Interview, April 6, 1989, at 7. *See* Exhibit 8.

[15] James Eveslage Interview, March 28, 1989, at 1. *See* Exhibit 9.

[16] Eveslage Interview at 1.

[17] Eveslage Interview at 1.

[18] Eveslage Interview at 1.

Following his conversation with Gioiosa, Eveslage contacted Ron Peters, a bookmaker in Franklin, Ohio.[20] Eveslage and Peters were good friends. They had known each other for about ten years—from the time Peters was the assistant golf pro at Beckett Ridge Country Club in Franklin, Ohio. Eveslage was a member of that club. Eveslage and Peters used to play poker at the club together at night. Eveslage told Peters: "I don't know if this guy, Gioiosa, is in business or not. He says he is laying down money for Pete Rose."[21] Eveslage subsequently introduced Gioiosa to Peters.[22] Although Eveslage failed to state when the introduction took place, Peters claims it occurred in the fall of 1984.[23]

For a period of two to three weeks after the introduction of Gioiosa to Peters, Eveslage claimed to have served as an intermediary between Gioiosa and Peters on each weekend during the football season.[24] Eveslage stated that Gioiosa placed bets on ten football games a weekend at $2,000 per game.[25] Eveslage advised that gambling payoffs were delivered to him at his home personally by Peters or Gioiosa.[26] Michael Fry confirmed Eveslage's recollection that Gioiosa placed bets for Pete Rose while Gioiosa was a regular at Gold's Gym.[27] Fry stated that Rose bet on football and basketball, but he added that he did not believe Rose bet on baseball.[28] Fry also stated, however, that Paul Janszen[29] bet on baseball based on tips from Rose:

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[19] Eveslage Interview at 2.

[20] Eveslage Interview at 2. Ron Peters has been a bookmaker since 1984. Peters Dep. at 5. On April 13, 1989, Peters expressed his intent in court to plead guilty to Tax Evasion and Conspiracy to Distribute Cocaine. *See* Exhibit 10.

[21] Eveslage Interview at 2.

[22] Eveslage Interview at 2.

[23] Ronald Peters Deposition, April 5, 1989, at 8-9. *See* Exhibit 11.

[24] Eveslage Interview at 2. Eveslage, however, stated that he did not earn any money for acting as their intermediary. Eveslage Interview at 2.

[25] Eveslage Interview at 2.

[26] Eveslage Interview at 2.

[27] Fry Interview at 15, *et seq.*

[28] Fry Interview at 29, 50-51.

> I can say for sure that Janszen was, but Pete—and I can say for sure that Pete was helping Janszen pick the teams, but then I remember Janszen also making the statement that Pete he was having better luck picking the teams than Pete was for the baseball bets.[30]

Further, Fry said that Janszen could not afford to bet $2,000 a game on baseball:

> BRI: Would Janszen bet $2,000 a game?
> FRY: No. He didn't have the money.
> BRI: So if there were bets placed with Ron Peters say $2,000 a game . . . .
> FRY: You can bet on it, you can almost be assured that it was Pete Rose . . .
> BRI: And you say Paul Janszen did not have that kind of money?
> FRY: No. Paul didn't have that kind of money. Not to bet no $2,000 a game.[31]

The betting records of Janszen and Peters, however, indicate baseball bets of $500, $1,500, $2,000 and $2,500 on the Cincinnati Reds and other Major League teams.[32] According to Janszen and Peters, the $500 baseball bets were Janszen's and the $2,000 bets were Rose's.[33]

Lance Humphrey, the daytime manager of Gold's Gym, stated that Tommy Gioiosa boasted of being a professional gambler.[34] Humphrey personally observed Gioiosa placing bets for $1,000 to $5,000 per game on football, basketball and baseball.[35] Rose would call Gioiosa at the gym frequently, and Gioiosa told Humphrey that he was placing the bets for Pete Rose.[36] Humphrey also advised that Gioiosa did not have the financial wherewithal to place bets for himself, except possibly with drug proceeds.[37]

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[29] Rose's relationship with Janszen is discussed more fully at Section III-C.

[30] Fry Interview at 50.

[31] Fry Interview at 51.

[32] *See* Exhibits 12, 13.

[33] Paul Janszen Interview, April 27, 1989, at 1. *See* Exhibit 81. Memorandum of Ron Peters Interview, May 1, 1989, at 2. *See* Exhibit 73.

[34] Transcript of Lance Humphrey Interview, March 30, 1989, at 6. *See* Exhibit 14.

Peters verified Eveslage's account. He testified that he was introduced to Tommy Gioiosa by Eveslage in the fall of 1984, and began to take bets from Gioiosa for Pete Rose.[38] The amount of the bets was usually $2,000 per game, but sometimes as high as $5,000 per game.[39] The bets at that time were on football.[40]

Peters testified that he took bets from Gioiosa and Pete Rose during the period from late 1984 to late 1986, when he stopped taking Rose's action.[41] He stated that Pete Rose bet on professional football, college basketball, and Major League baseball.[42] He specifically stated that Pete Rose bet on Major League baseball games in 1985, 1986 and 1987, including games played by the Cincinnati Reds while Pete Rose was both a player and manager:[43]

> DOWD: And when he bet baseball, did he bet on the Cincinnati Reds?
> PETERS: Yes, he did.
> DOWD: And was this at a time that he was Manager of the Cincinnati Reds?
> PETERS: Yes, sir.
> DOWD: Is there any doubt in your mind?
> PETERS: Absolutely not.[44]

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[35] Humphrey Interview at 6-7.
[36] Humphrey Interview at 8-9.
[37] Humphrey Interview at 14.
[38] Peters Dep. at 8-9.
[39] Peters Dep. at 9.
[40] Peters Dep. at 9.
[41] Peters Dep. at 9-10.
[42] Peters Dep. at 10.
[43] Peters Dep. at 10-12.
[44] Peters Dep. at 12.

Although Gioiosa usually placed the bets for Rose during this period, on four to six occasions, Rose contacted Peters directly.[45] On one of these occasions, in 1985 or 1986, Pete Rose called Peters to place bets on baseball, including the Cincinnati Reds. Peters recorded the conversation, and then played the tape back to Pete Rose. Rose became upset and asked him why he had taped him. Peters explained to him that he wanted an insurance policy to make sure Rose would pay his gambling losses.[46] The tape, however, cannot be located.[47]

During his deposition on April 20-21, 1989, Pete Rose denied that Gioiosa ever placed bets on baseball games for him:

> DOWD: Did Tommy bet major league baseball for you?
> ROSE: No. Nobody bets major league baseball for me.[48]

However, Rose admitted that he has bet on sports events since 1975.[49] The only person with whom Rose acknowledged making bets was Tommy Gioiosa, with whom Rose said he placed bets on professional football and college and professional basketball games, from 1984-1988.[50] Rose stated that Gioiosa was not a bookmaker, but claimed he did not know with whom Gioiosa placed the bets.[51] Rose stated that Gioiosa never called a bookmaker from Rose's house.[52]

During his deposition, Rose revealed a good deal of personal knowledge of how bookmakers operate. For example,

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[45] Peters Dep. at 11.

[46] Peters Dep. at 20.

[47] Peters stated that he left the tape in his house with other records and belongings after he was divorced from his wife, Lori, this year. Peters believes the tape may be packed in a box in Lori Peters' house. Lori Peters stated that she has searched for the tape, but has been unable to locate it. Peters Dep. at 21; Lori Peters Interview, April 7, 1989, at 3. *See* Exhibit 15. Lori Peters, during an interview, recalled Peters telling her that he was taking action from Pete Rose and that Rose was placing his bets through Tommy Gioiosa. Lori Peters Interview at 1.

[48] Rose Dep. at 83.

[49] Rose Dep. at 134.

[50] Rose Dep. at 135.

[51] Rose Dep. at 60-61.

[52] Rose Dep. at 64-65.

Rose stated that he settled up his bets on Tuesday after the weekend and Monday night football games were over.[53] Rose explained that bookies make their money by charging a 10% fee, which he volunteered was called "vigorish," a bookmaking term.[54] Rose elaborated that if you bet $1,000 and you lose, you pay $1,100; if you bet $500 and lose, you pay $550.[55] Rose also testified that when Gioiosa bet, he bet on credit, *i.e.*, he did not have to put cash up before betting. Rose said he could not recall whether it was his credit or Gioiosa's, because he did not know how Gioiosa called in the bet.[56] Rose said he always bet the same amount—$1,000 per professional football game. The most he ever bet was $2,000 on the Super Bowl. The most he ever lost was $34,000 on college basketball games.[57]

While acknowledging a good deal about gambling, Rose did not acknowledge that in gambling parlance, a "dime" means "ten."[58] When asked whether a "dime" means "one thousand," Rose said, "It don't to me."[59] This assertion by Rose is belied by a key exhibit in this case: three betting sheets in Pete Rose's own handwriting listing bets on baseball games, including the Cincinnati Reds.[60] These sheets, which are discussed in more detail in the "Documentary Evidence" section of the report, cover baseball games played in early April 1987. They have been determined by a handwriting expert to be in Rose's handwriting. The sheets include three Cincinnati Reds games and handwriting showing "5 dimes" being bet on several games.[61] A "dime" means one thousand dollars in gambling parlance.[62]

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[53] Rose Dep. at 65-66.

[54] Rose Dep. at 68.

[55] Rose Dep. at 68.

[56] Rose Dep. at 64.

[57] Rose Dep. at 62-63, 72-73.

[58] Rose Dep. at 183.

[59] Rose Dep. at 183.

[60] *See* Exhibit 16.

[61] Rose's betting sheets have also been examined by a retired F.B.I. agent with 20 years' experience in gambling investigations. His conclusions, which are also included in Section IV, are that the sheets reflect actual gambling activity. *See* Report of William Holmes, May 2, 1989. *See* Exhibit 17.

[62] Holmes Report at 4.

During his deposition Rose was confronted with the betting sheets determined by expert analysis to be in his handwriting.[63] When asked whether the handwriting on the sheets was his, Rose responded that "I couldn't tell you if that's my handwriting" and "I don't recognize it as my handwriting."[64] Rose also testified that he did not recognize the betting sheets as something he had seen before.[65] When advised that a handwriting expert had analyzed the sheets and determined that the handwriting was his, Rose responded: "All I can tell you is what I know. I can't disagree or agree with that. I mean I never seen that before."[66]

Peters' testimony about Rose's betting on sports events, including baseball, is supported by Peters' associate, Dave Morgan. Morgan was a golf course maintenance man at the Beckett Ridge Country Club where Peters was an assistant golf pro.[67] Morgan also attended high school with Peters and lived with him for approximately eight months in 1978.[68] Morgan testified that in 1985 he learned that Peters was in the bookmaking business, when Peters asked him for assistance in taking bets from the smaller players, whom Morgan described as those who bet between $50-$100.[69] Morgan agreed, and the next two and one-half years, from 1985 to 1987, he assisted Peters with his bookmaking business.[70] Peters, on the other hand, concentrated on taking bets from the big players—those who bet over $100.[71] Whenever the big players called to bet, Morgan gave the phone to Peters.[72]

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[63] Rose Dep. at 286-287, 299-300.

[64] Rose Dep. at 286.

[65] Rose Dep. at 299.

[66] Rose Dep. at 299-300.

[67] Dave Morgan Interview, March 29, 1989, at 1. *See* Exhibit 18.

[68] Dave Morgan Deposition, April 12, 1989, at 3-4. *See* Exhibit 19.

[69] Morgan Interview at 1.

[70] Morgan Interview at 3.

[71] Morgan characterized a big player as a person who bet from $3,000 - $5,000 a game. Morgan Interview at 1.

[72] Morgan Interview at 1.

According to Morgan, one of Peters' big players was Tommy Gioiosa.[73] Morgan stated that Peters explained to him that Gioiosa was betting for Pete Rose.[74] Gioiosa also advised Morgan that "he was betting for Pete."[75] Although the big players used code names or numbers to identify themselves, Gioiosa never used a code name or number when he called to place a bet.[76] When Gioiosa called and Morgan answered the phone, Morgan turned the phone over to Peters.[77] According to Morgan, Gioiosa was placing bets on football and basketball.[78] During basketball season, Gioiosa called every night.[79]

Morgan also testified that, when Peters was too busy to collect the losses, Peters sent Morgan to pick up the money from Gioiosa.[80] Morgan recalled meeting with Gioiosa on at least five separate occasions to collect for Peters.[81] Two of these meetings took place at Gold's Gym, two were at a gas station parking lot near Route 747 and I-275 in Tri-County, and one was in the parking lot of an old truck stop located at I-75 and Cincinnati-Dayton Road.[82] Morgan recalled collecting $22,000 and $60,000 from Gioiosa, although he was not positive that the second pick-up was for $60,000.[83] The other three collections were for at least $10,000 cash each.[84] After he picked up the money, he delivered it to Peters. Morgan testified:

> I'd just pull up and he'd throw it into my car. You know, he'd have it wrapped in rubber bands or something, he'd throw it

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[73] Morgan Interview at 1.

[74] Morgan Dep. at 6.

[75] Morgan Dep. at 6.

[76] Morgan Interview at 1.

[77] Morgan Interview at 1.

[78] Morgan Interview at 1.

[79] Morgan Interview at 1.

[80] Morgan Interview at 1.

[81] Morgan Interview at 1-2.

[82] Morgan Interview at 2.

[83] Morgan Dep. at 8; Morgan Interview at 2.

[84] Morgan Interview at 2. Money from Gioiosa was usually in $1,000 bundles consisting of 20, 50 and 100 dollar bills. Morgan Dep. at 8; Morgan Interview at 2.

> in my car. And, you know, I'd just take it back to Ron and hand it to him.[85]

If Peters lost money on the gambling activity, Morgan explained that Peters would personally handle the payoffs.[86]

Because Peters' betting activity was light during baseball season,[87] and Morgan's duties on the golf course occupied most of his time, Morgan did not answer the phone during this time.[88] Instead, Peters handled most of the calls.[89] Morgan, however, recalled Peters telling him during the 1987 baseball season that he was "getting murdered" by Pete Rose on baseball.[90] Morgan stated that Peters advised him that Rose had him "hooked" for "about seventy-five thousand."[91] According to Morgan, Rose's winnings occurred near the beginning of the baseball season when Cincinnati was "winning a lot of games."[92]

Morgan never met Pete Rose. He recalled, however, answering a call from Rose on one occasion during the football or basketball season.[93] He was not sure whether the caller identified himself as Pete, or if he recognized the voice as that of Pete Rose because he had heard him on the radio or television.[94] Morgan gave the phone to Peters who handled the transaction.

Peters testified that he assigned Rose a code number, 14, his player number, which Rose never used.[95] Instead, when Rose called him directly, he would always state, "This is

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[85] Morgan Dep. at 7.

[86] Morgan Dep. at 9; Morgan Interview at 2.

[87] In fact, according to Peters, Rose was the only baseball action he took. Memorandum of Peters Conversation with John M. Dowd, April 5, 1989. *See* Exhibit 20.

[88] Morgan Interview at 2.

[89] Morgan Interview at 2.

[90] Morgan Dep. at 9.

[91] Morgan Dep. at 9.

[92] Morgan Interview at 2. Cincinnati's record was 46 wins and 36 losses after the first three months of the 1987 season. They were in first place by two and a half games. 1988 Cincinnati Reds Media Guide. *See* Exhibit 21.

[93] Morgan Dep. at 10.

[94] Morgan Dep. at 10.

[95] Peters Dep. at 15.

Pete."[96] Peters recalled one occasion in which he received a call directly from Pete Rose to place a bet five minutes before game time.[97] This event stayed in Peters' mind because he specifically recalled viewing Rose in the dugout on television five minutes after their conversation ended.[98] Additionally, the telephone toll records of Gold's Gym show frequent calls to Ron Peters during 1986, including the Major League Baseball season.[99]

Gioiosa handled the payoffs of Rose's losses to Peters.[100] Peters remembered one particular occasion, in 1986, when Rose owed him $24,000.[101] He said that Gioiosa came to see him at Jonathan's Cafe, a restaurant owned by Peters in Franklin, Ohio, and tried to pay him with three $8,000 checks payable to cash and signed by Pete Rose.[102] He told Gioiosa to cash the checks because he did not want his name on the checks.[103] Gioiosa had the checks cashed and the next day gave Peters $24,000 in cash.[104]

Peters' recollection of the attempt by Gioiosa to pay him by check in 1986 is supported by Pete Rose's bank records, including four of his personal checks dated February 5, 1986.[105] One check is payable to Tommy Gioiosa for $8,000; one check is payable to Mike Fry for $8,000; and two checks are payable to cash for $8,000. All four checks were signed by Pete Rose and endorsed by Mike Fry; Gioiosa also endorsed two of the checks.[106] Peters identified three of these checks as the checks that were presented to him by Gioiosa to pay off the $24,000 debt.[107] Peters further testified that he would not have extended credit to Gioiosa to place large bets because of Gioiosa's meager financial situation.[108]

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[96] Peters Dep. at 15.

[97] Peters Dep. at 19-20.

[98] Peters Dep. at 19-20.

[99] *See* Exhibit 22.

[100] Peters Dep. at 16-17.

[101] Peters Dep. at 17.

[102] Peters Dep. at 17.

[103] Peters Dep. at 17.

[104] Peters Dep. at 17.

[105] Pete Rose Personal Checks, #365-#368, dated February 5, 1986. *See* Exhibit 23.

[106] Peters Dep. at 18. *See* Exhibit 23.

Mike Fry did not specifically recall cashing these checks, but he stated that he often cashed checks for Gioiosa because Gioiosa had no credit or business relationship with a bank.[109] Fry testified that he was frequently asked by Rose or Gioiosa to cash Rose's checks.[110] Fry further testified he loaned cash of $17,000 and $30,000 to Pete Rose to pay his gambling debts in the fall of 1985.[111] The first loan of $17,000 was delivered by Fry to Gioiosa at the Riverfront Stadium clubhouse in September 1985, in the presence of Rose.[112] Fry was repaid by Rose several weeks later.[113] Fry described the transaction as follows:

> I'd met Pete at the gym, sure, but I never really talked to him or associated with him and when I went down there I got a little close to Pete at the time and Pete called me Mike and he knew who I was and Gioiosa asked me if I had $17,000, that he needed to pay a bookie with. I said sure. I have 17 grand, here and I gave it to him. A few weeks later, Pete repaid me.[114]

The second loan was for $30,000 in October or November 1985:[115]

> The second time I loaned him money I was a little skeptical about it, so we struck a deal. Pete had broke the record and received a red Corvette, I put the red Corvette in my garage. It sat there for a few months. I marketed the car as a Pete Rose collector of memorabilia, collector item. I paid for a car cover, I had it exclusively for Mr. Pete Rose, 9/11/85-4192 and

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[107] Peters Dep. at 18-19.
[108] Peters Dep. at 9.
[109] Fry Interview at 18-19.
[110] Fry Interview at 18-19.
[111] Fry Interview at 15, 21-24.
[112] Fry Interview at 15-18.
[113] Fry Interview at 15, 21.
[114] Fry Interview at 15.
[115] Fry Interview at 22, 24-29.

> we were supposed to market the car and split the money when we sold it. Pete and I would, and I was to get my $30,000 back at that point.[116] Fry was repaid in cash, in early 1986,[117] but he never received "the half of what [Pete] owed me for helping with the car."[118]

Rose denied receiving these loans from Fry.[119] Rose further testified that Fry never loaned him money, and he never paid money to Fry.[120] He also testified that he never saw Mike Fry in the Cincinnati Reds clubhouse.[121]

Rose testified that it was Gioiosa who took care of the Corvette he received when he broke Ty Cobb's record, not Fry.[122] However, Rose did testify that Gioiosa arranged for a "spare garage" in which to store the car, as well as a car cover with the number "4192" on it.[123]

Fry further testified that Rose sold Don Stenger his $100,000 M1 BMW for $75,000 in cash to pay a gambling debt.[124] Rose acknowledged that he sold his $100,000 M1 BMW to Don Stenger, but Rose recalled the sales price to be approximately $50,000.[125] Rose claimed that he sold the Ml for a low price because he had blown out the engine after a couple of years and Stenger had a "real good mechanic . . . and he [Stenger] said he could fix it up."[126] Rose could not recall if he was paid in cash or by check.[127]

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[116] Fry Interview at 23-24.

[117] Fry Interview at 31.

[118] Fry Interview at 31. Rose testified that he ultimately sold the Corvette to Steve Wolter, his insurance agent, for $55,000, even though the car was valued by Rose at $30,000. Rose Dep. at 279. Rose testified that the car was given to him by General Motors, and not Marge Schott, the owner of the Reds, as was reported in the press. Rose explained that Schott had manipulated the press to make it look like she had given him the car. Rose Dep. at 279. Rose testified, "I had three Porsches and a Rolls Royce. So what the hell do I need a Corvette for?" Rose Dep. at 279. Rose also testified that he sold the baseball bat and baseball that were involved in the breaking of Ty Cobb's all-time hit record to Wolter as well. Rose Dep. at 279.

[119] Rose Dep. at 160, 207.

[120] Rose Dep. at 155, 160, 207-208. This assertion by Rose is contradicted by Rose's check to Fry for $8,000 on February 5, 1986. *See* Exhibit 23.

[121] Rose Dep. at 160-161.

[122] Rose Dep. at 161.

[123] Rose Dep. at 161.

[124] Fry Interview at 10-12, 77. When Don Stenger was interviewed, he confirmed that he did purchase the BMW from Rose, but he did not recall the cost. Stenger said he made payments on the car to Tommy Gioiosa when he had the money. Don Stenger Interview at 5.

Peters recalled that in 1985 or 1986, Pete Rose personally visited Jonathan's Cafe with Tommy Gioiosa and Mike Fry to collect $37,000 in winnings for Rose.[128] Peters said that Pete Rose, during this visit, gave a black Mizuno bat to Peters for Jonathan's Cafe.[129] The bat is endorsed "To Jonathan's Cafe, Best Wishes, Pete Rose."[130] While Rose and Fry were having lunch, Peters gave Gioiosa $37,000 in the back room or the men's room, which Gioiosa stuck in his sock.[131]

Rose admitted that he traveled with Gioiosa to Jonathan's Cafe on one occasion.[132] Rose stated that he went to Jonathan's because Gioiosa "had to deliver something to somebody."[133] He stated that upon arrival at Jonathan's, Gioiosa and Peters "went back in the back room and talked about something."[134] He did not know what they talked about, and Rose added, it "wasn't none of my damn business."[135] Rose did recall, however, what he had for lunch ("tunafish sandwich and ice tea") and that he gave Peters a bat autographed "To Jonathan's."[136] Rose emphasized that this was the only time he met or spoke with Ron Peters.[137] Rose also testified that

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[125] Rose Dep. at 128.

[126] Rose Dep. at 128.

[127] Rose Dep. at 128.

[128] Peters Dep. at 12-13.

[129] Peters Dep. at 13. Joe Daly, Kevin Hallinan and John Dowd have seen the bat in the office of Peters' attorney in Franklin, Ohio.

[130] Peters Dep. at 13.

[131] Peters Dep. at 13-14.

[132] Rose Dep. at 136.

[133] Rose Dep. at 136.

[134] Rose Dep. at 137.

[135] Rose Dep. at 140.

[136] Rose Dep. at 137.

[137] Rose Dep. at 136-37. *But see* the Cincinnati Reds Complimentary Ticket Request records, which indicate that Rose ordered tickets to the Reds game for Peters on at least two occasions—May 30, 1986 and June 5, 1987. *See* Exhibit 24.

Gioiosa was not there to pick up gambling winnings for him from Peters.[138]

Peters further testified that in late 1986 Rose refused to pay him $34,000 that Rose owed him for losses on gambling action.[139] Gioiosa told Peters that Rose was unable to pay Peters because he had to pay a mafia bookmaker in New York.[140] Because Peters was not paid the $34,000 owed to him by Rose, he did not take any further baseball betting from Rose until May 1987.[141]

Rose testified that Gioiosa probably asked him for the tickets. Rose Dep. at 353.

Also, a conversation on March 13, 1989 between Peters and Robert Pitcairn, an attorney for Rose, tape recorded by Peters, indicates Rose knew Peters better than Rose acknowledged in his testimony. Rose Dep. at 137. On March 13, 1989, Peters called Reuven Katz, Rose's attorney, in an attempt to reach Rose. Peters Dep. at 30. Katz was not in, so Peters left a message for him. Peters Dep. at 30. Later that day, Katz's partner, Robert Pitcairn, returned Peters' call. Peters Dep. at 30. Peters described the conversation as follows:

> DOWD: You didn't ask Mr. Pitcairn to call you back?
> PETERS: No. I didn't even know him.
> DOWD: Had you ever met him?
> PETERS: Never.
> DOWD: Did he ask you who you were?
> PETERS: No, never. Not one time. My opinion is he obviously knew who I was, the way he was talking to me.
> DOWD: Was he friendly?
> PETERS: Yes, very friendly. He never asked who I was and is this a prank call or anything like that.
> DOWD: Which you would have expected since you'd never known him.
> PETERS: Right.
> DOWD: Like, "Who the hell are you?"
> PETERS: Right.

Peters Dep. at 31.

[138] Rose Dep. at 140.

[139] Peters Dep. at 21.

[140] Peters Dep. at 22.

[141] Peters Dep. at 22. As explained later in Section III-D, the betting connection with Peters was resumed in May 1987.

B. The Rose-Bertolini Betting

Beginning in 1985, Pete Rose took another young man under his wing—Michael Bertolini from Brooklyn, New York—who was in the baseball card show, autograph and memorabilia business. Bertolini became an exclusive photographer for Rose and other ball players, a seller of memorabilia and director-producer of Pete Rose's card show.[142]

In addition, Bertolini was a runner of gambling bets for Pete Rose to an unidentified bookmaker in New York.[143] This was revealed in a telephone conversation on April 4, 1988 with Paul Janszen, which Janszen taped. Bertolini described how Rose owed the New York bookies, and Bertolini, large sums of money:

> JANSZEN: Did you ever get settled up with Pete?
> BERTOLINI: About what?
> JANSZEN: The money.
> BERTOLINI: Fuck'n, we're working it out and shit, I don't know, the fuck. Did you ever?
> JANSZEN: He still owes me about 12 grand.

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[142] Bertolini denied placing bets for Pete Rose. Upon the advice of counsel, Bertolini refused to submit to an interview or to produce records from the two companies he operates with the financial assistance of Pete Rose: Sports Images, Inc. and Hit King Marketing, Inc. Counsel for Rose said they do not have control of any records of these corporations and were unable to produce them, except for some limited records regarding Sports Images, Inc. Letters to John Dowd from Robert Pitcairn dated March 23, 1989, March 27, 1989 and March 30, 1989. *See* Exhibit 25.

[143] Janszen stated that Rose placed bets through Bertolini on baseball during the same April, May, June 1987 period that Rose was using Janszen to bet with Steve Chevashore, Peters and a bookmaker known as Val. Transcript of Janszen Interview, February 24-25, 1989, at 45-46. *See* Exhibit 26. Rose's betting with Chevashore and Val is discussed in Section III-C. Paul Janszen explained the reasoning behind using two bookies:

> Pete was also doubling up in betting with the guy in New York so he could play it . . . basically the way you play it . . . if you are losing both ways at least you are not down $200,000 with one guy. Within a three month period of time, Pete Rose was in debt over $400,000 to the bookie in New York via Mike Bertolini in baseball betting alone.

Janszen Interview, February 24-25, 1989, at 46.

BERTOLINI: So, he paid you about 38.
JANSZEN: Huh?
BERTOLINI: How much, did he pay you anything yet?
JANSZEN: No, well that's all that, what he did was he signed a bunch of autographs for me.
BERTOLINI: I hear you.
JANSZEN: And, you know, plus he wrote some checks that I had cashed that I sent up to the guy.
BERTOLINI: Yeah.
JANSZEN: So he's into me for about anywhere from, I don't know, once you figure out all the autograph stuff, he probably owes me about, anywhere from like 10-12,000.
BERTOLINI: Yeah, I hear you.
JANSZEN: Did he ever get . . . wait a minute, he was up to you for how much total?
BERTOLINI: What me or all together?
JANSZEN: No, the guy . . . the bookies in New York, how much did he—
BERTOLINI: Don't talk like that on the phone, I hate that.
JANSZEN: Alright, how much did he owe you, owe them?
BERTOLINI: All together between me and them about 2, . . . 2 and a quarter.[144]

* * * * * * * * * * * * *

BERTOLINI: What are they gonna do Paulie? They made enough off of him. What the fuck are they gonna do to him? Like Denny . . . were you with us, yeah you were with us with Denny McLain weren't you?
JANSZEN: Yeah.
BERTOLINI: Were you there that day, yeah.
JANSZEN: Yeah.
BERTOLINI: You heard what McLain said, he says what can you do? You can't do anything.

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[144] Transcript of Janszen-Bertolini Conservation, taped by Janszen on April 4, 1988, at 7-8. *See* Exhibit 27.

JANSZEN: I tell you, you a . . . he's gonna be, you never know Mike. How much did he find, how much did he wind up paying them total?
BERTOLINI: Paying them that they've gotten, cash?
JANSZEN: Yeah.
BERTOLINI: About 150-200.
JANSZEN: Oh, so he's already paid half of it?
BERTOLINI: Well no, no. That, see, we were paying as, you know, every so often as we lost. Then we just let this one build until after the Super Bowl was over.
JANSZEN: Yeah.
BERTOLINI: They got him for enough. You know what I'm saying it's not like they got 25 and then we started this and now we're gonna screw them out of this. What he owes, they already got that much in previous loss.
JANSZEN: Yeah.
BERTOLINI: Know what I'm saying. Man, fuck'n, they already raped the guy, fuck it man.[145]

* * * * * * * * * * * *

JANSZEN: But do they still ask about the money?
BERTOLINI: Yeah, what the fuck, they ain't gonna do shit to me. They know who's the, you know, who did it. Because he's told them, he's talk to them lots of times. What can they do him, they can't do nothing, there's no proof. The only proof actual, positive, 100% proof is me that's it.
JANSZEN: Yeah.
BERTOLINI: Anything else is just hearsay. I don't care if a million people say, oh yea, I know it too. I'm the only one who can prove and man, he's my best friend in the whole world.
JANSZEN: Yeah.
BERTOLINI: Know what I'm saying, fuck that, I'd die before I'd get him in trouble.[146]

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[145] Janszen-Bertolini Conversation at 9-11.

[146] Janszen-Bertolini Conversation at 11-12. According to Steve Chevashore, who placed bets for Rose in Tampa, Florida during Spring training 1987, (*see* Section 111-C), Bertolini was also not in good standing with the bookies in New York:

As described previously, Gioiosa told Peters in late 1986 that Rose could not pay Peters because he was paying a New York bookmaker.[147] This statement has been corroborated by (1) Bertolini, in his taped telephone conversation with Janszen; and (2) personal checks and account statements of Pete Rose at Oak Hills Savings and Loan in Cincinnati, Ohio.[148] These records reveal that Pete Rose wrote 11 checks to fictitious payees, each in the amount of $8,000, from November 16, 1986 to December 3, 1986. The checks were sent to Michael Bertolini. Ten of the eleven checks were endorsed and deposited to the account of Rosic Trading Corp., which is a check cashing service and newsstand in New York.[149] In the tape recorded telephone conversation of April 4, 1988 between Bertolini and Janszen, Bertolini graphically described how Pete Rose used to send him $8,000 checks payable to fictitious names to pay Rose's gambling debts:

> JANSZEN: You should have done what I did. Whenever it got up to like 20-some I made him [Rose] write, you know, he might only come up with half of it but you know, I was out, there was a time when I was out . . .

CHEVASHORE: Can I ask you something? Do you remember that time Val finally came up there and wanted to pay you because you had $4-$5,000 and you had that fat . . . what's his name, that fat guy there?
JANSZEN: Yeah.
CHEVASHORE: Well, I heard that that guy [Mike Bertolini] was in serious trouble with people here in New York?
JANSZEN: He is. That fat guy was betting for . . .
CHEVASHORE: What was his name again?
JANSZEN: Mike Bertolini.
CHEVASHORE: Yeah, Michael yeah.

Transcript of Janszen-Chevashore Conversation, taped by Janszen on December 27, 1988, at 19-20. *See* Exhibit 28.

[147] Peters Dep. at 22.

[148] Pete Rose Personal Checks, #182-#187, #412-#417, #188-#192, #195, dated from November 16, 1986 to December 3, 1986, and Account statement at Oak Hills Savings and Loan for October, November, December 1986. *See* Exhibit 29.

[149] The eleventh check, dated December 3, 1986 to a "Bob Smith" for $8,000 was endorsed by "Bob Smith" and "Bruno Fiorito," a friend of Mike Bertolini. *See* Exhibit 29.

> BERTOLINI: He used to, he used to mail me 60,000 bucks every, I used to fly out there and get checks. I remember, he used to send it fuck'n, the Express Mail, I couldn't believe it. It was so funny, Petey sending me stuff. He used to send me like 8 checks, 8,000 each made out to all different names.
> JANSZEN: Ah, at least it was under 10,
> BERTOLINI: What, yeah.
> JANSZEN: Made out to every, oh, he had different names.
> BERTOLINI: Yeah, I mean he used to mail me checks whenever.
> JANSZEN: Yeah, well
> BERTOLINI: Then it got so high and shit and fuck'n, you know, it was like he said, man no matter how good I do, it's like I never go down.[150]

On May 22, 1987, Peter Rose signed as a co-borrower with Michael Bertolini on a $43,000 loan at Star Bank in Cincinnati.[151] Later in September 1987, Rose signed as sole borrower on a $50,000 loan from Star Bank, which he acknowledged was for Bertolini.[152] Rose also arranged for, and signed as an endorser of, a $125,000 loan from Star Bank to Hit King Marketing, Inc., Bertolini's company, on February 23, 1989.[153] Bertolini told Janszen that Rose arranged the loans for Bertolini so Rose could pay his gambling debts.[154]

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[150] Janszen-Bertolini Conversation at 23-24.

[151] Rose Dep. at 240; Loan Agreement, Star Bank, dated May 22, 1987. *See* Exhibit 30.

[152] Rose Dep. at 240-244; Loan Agreement, Star Bank, dated September 1987. *See* Exhibit 31.

[153] Loan Agreement, Star Bank, dated February 23, 1989. *See* Exhibit 32.

[154] Janszen-Bertolini Conversation at 27-30. In a letter dated March 30, 1989, to Rose's counsel, Robert Pitcairn, we requested copies of all records in Star Bank's possession pertaining to Sports Images, Inc. and Hit King Marketing, Inc. *See* Exhibit 33. Subsequent letters to Rose's counsel of April 11, 1989 and April 27, 1989 again requested these documents. *See* Exhibits 34, 35. Mr. Rose stated during his deposition that Ms. Menike of the Star Bank was prepared to produce all of the records requested. Rose Dep. at 241-243. In an April 27, 1989 letter, counsel for Rose stated that Star Bank would not release the monthly statements and copies of checks of Sports Images and Hit King Marketing without the authoriza-

Rose's indebtedness to Bertolini is further established by other excerpts from the Janszen-Bertolini conversation of April 4, 1988. Bertolini told Janszen that Rose owed Bertolini approximately $70,000 for gambling debts paid by Bertolini:

> JANSZEN: I mean what's he into you for right now?
> BERTOLINI: Well me, about 70-something.
> JANSZEN: Didn't he ever, didn't he ever take care of you like he did with me, like, you know, give you a little bit at a time and . . .
> BERTOLINI: Yeah, he did. But he's given me like, like 9,000. I have it all written down. You know, he's given me like 9,000 in five different times . . .
> JANSZEN: Well.
> BERTOLINI: You know, like 2,000 one; 15 two, like that.
> JANSZEN: Well I guess when you're, you were up there 5 times what I was
> BERTOLINI: You know, he's like, I have it written down and everything, like he says to me the other day, you probably thousand dollared me to death. I said, I got it all written down, Petey. I said man, you still owe me 70-something. And, I said, the worst part about it is originally he only owed me like 40 and he owed Bruno like 35, right.
> JANSZEN: Right.
> BERTOLINI: Well, Bill owed me 35. So I said, Bill you pay Bruno and now Bruno's money that Pete owed Bruno
> JANSZEN: Yeah.
> BERTOLINI: Is now mine. So fuck'n I only, man Pete's like 2/3 of the money I got in the whole world, man.
> JANSZEN: Yeah.
> BERTOLINI: You know, and plus I owe on loans and shit. I mean, last year at this time I didn't have nothing left, man. At least now I got like fuck'n

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tion of Mr. Bertolini. Counsel did not say the bank would not release the records to Mr. Rose. *See* Exhibit 36.

On May 4, 1989, we received copies of the $43,000 and $50,000 loan notes from Star Bank described in the text. In addition, we were provided a copy of a 35-day promissory note for $28,000 which Rose signed with Star Bank on April 4, 1989. *See* Exhibit 37.

> JANSZEN: Yeah, but
> BERTOLINI: Made like 50 or 60 grand to play with right now.
> JANSZEN: But your problem was, you let, you went and let him, you just kept putting stuff in. You should have stopped.
> BERTOLINI: I did, but fuck it.
> JANSZEN: Yeah, you did but after it was up there so high that you know every week,
> BERTOLINI: What was I supposed to do? He wanted to do it, I was fuck'n.[155]

Other records from Rose's account at Oak Hills Savings and Loan may lend support to Bertolini's statements that Rose paid him different amounts at various times, and that Rose paid the New York bookmaker "150-200" in cash.[156] We have requested from Pete Rose all of the Oak Hills records for 1986, but have only been provided copies of some cancelled checks for October, November and December of 1986, as well as the account statements for the entire year. The account statements not only list the 11 checks for $8,000 described previously (of which we were provided copies), but also numerous checks for $7,000, $8,000 and $9,000 (only some of which we were provided copies).[157] For example, the statement of October lists five checks for $8,000, all paid on October 9, 1986. The statement of November 20, 1986, lists checks for $9,000 and $7,000 paid on October 30, 1986; two checks for $7,000 paid on October 31, 1986; eight checks for $8,000 paid on November 10, 1986; and a check for $5,000 paid on November 17, 1986. These checks total

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[155] Janszen-Bertolini Conversation at 21-23.

[156] Janszen-Bertolini Conversation at 10-11.

[157] *See* Exhibit 29. Early in the investigation we requested Rose to produce all his bank account records. However, the records of Rose's account at Oak Hills Savings and Loan were not produced by Rose along with his other bank account records. We learned about this account when we saw reference to it in other records. Upon learning of the account's existence, we requested Rose to produce the Oak Hills records. Thereafter, we were provided copies of the eleven checks for $8,000 described in the text. On May 4, 1989, we were provided copies of some additional checks, many of which were illegible. Letter to John Dowd from Robert Pitcairn, April 27, 1989. *See* Exhibit 36.

$139,000.[158] When combined with the 11 checks for $8,000 described previously, the total of all these checks, written over a three-month period beginning in early October 1986, the end of the regular baseball season, is $227,000.

When asked about the purpose of the $88,000 shipped to Bertolini, Rose stated that it was not to pay gambling debts.[159] In fact, Rose denied that Bertolini ever placed bets for him.[160] Rose further testified that the eleven checks for $8,000 were sent to Bertolini in late 1986 to pre-pay athletes for memorabilia shows.[161] Bertolini told Rose who the payees should be on the checks, and in his deposition, Rose acknowledged that the names were fictitious.[162] Rose also testified that if the checks were made out for over $10,000 "you've got to fill out a bank form and stuff."[163] "He [Bertolini] didn't want to do that."[164] Additionally, Rose explained that if he had written "a check for eighty thousand out to Mike Bertolini . . . that would wake everybody in the world up."[165]

Rose claimed the money was a loan to Bertolini and that because Bertolini was an honest man whom Rose trusted, Bertolini did not need to sign a note with him:[166]

> DOWD: So you trust him.
> ROSE: Absolutely; a hundred percent.
> DOWD: An honest guy.
> ROSE: He's never crossed me. And I've signed some notes for him.[167]

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[158] *See* Exhibit 29.

[159] Rose Dep. at 340.

[160] Rose Dep. at 84.

[161] Rose Dep. at 109-110.

[162] Rose Dep. at 110, 247-250.

[163] Rose Dep. at 110. Were Bertolini to have cashed a check in excess of $10,000, U.S. Treasury regulations would have required a report of the transaction be made. *See* 31 C.F.R. § 103.22.

[164] Rose Dep. at 110.

[165] Rose Dep. at 112.

[166] Rose Dep. at 112.

[167] Rose Dep. at 112.

Rose stated that Bertolini has paid back the $80,000 in cash, a little at a time:

> DOWD: Has Bertolini paid you the eighty thousand you gave him in November/December '86?
> ROSE: Oh yes.
> DOWD: And how did he do that?
> ROSE: Just a little at a time, cash at a time.
> DOWD: Cash?
> ROSE: Yes.[168]

During his deposition, we played for Rose the entire tape of the Janszen-Bertolini conversation of April 4, 1988. Rose listened carefully and afterwards stated that the tape "don't mean diddly-squat to me."[169] At first, Rose testified that Bertolini was making up things to say to Janszen on the tape and described it as "the blind leading the blind."[170]

However, Rose had difficulty explaining why Bertolini would make up negative information about him, *i.e.,* that Rose owed "Bruno" and Bertolini money.[171] At one point Rose said, "I can't tell you why them guys are saying those things."[172] Finally, Rose said that if Bertolini said Rose owed him money, Bertolini would be "lying."[173] Rose adamantly stated, "I owe nobody nothing."[174]

When asked about Bertolini's statements on the tape about Rose mailing checks to him, and Bertolini's saying that Rose had said "man, no matter how good I do, it's like I never go down [in the gambling debt]," Rose testified that he had no idea what Bertolini was talking about, and reiterated that he had already told us the purpose of the checks to Bertolini.[175] Rose again adamantly stated: "I'm going to say this one more time. I don't owe anybody a dime. New York; New England; New Mexico. A dime. Nothing."[176]

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[168] Rose Dep. at 118.
[169] Rose Dep. at 344.
[170] Rose Dep. at 349.
[171] Rose Dep. at 341-344.
[172] Rose Dep. at 342.
[173] Rose Dep. at 343.
[174] Rose Dep. at 343.
[175] Rose Dep. at 345.

C. The Rose-Janszen-Chevashore / Val Betting —April, May 1987

1. Paul Janszen and Danita Marcum Are Introduced to Pete Rose

In the fall of 1986, Gioiosa introduced Paul Janszen to Pete Rose.[177] Janszen had attended the University of Cincinnati and worked as a salesman for the Queen City Barrel Company.[178] Janszen, who worked out at Gold's Gym, had seen Gioiosa with Rose from time to time in Gold's Gym, but he had never met Rose.[179] Janszen was also a distributor of steroids.[180] He knew Gioiosa was a big gambler and the "mule" for the cocaine operation for Stenger and Fry.[181] He also knew that Gioiosa was placing bets for Rose:

> Tommy would not only discuss this [his placing bets on sports for Rose] with me but he would brag about the money that was being wagered. And I think he felt somewhat important because he was handling such a huge task for Pete Rose.[182]

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[176] Rose Dep. at 345.

[177] Paul Janszen Deposition, April 4, 1989, at 15. *See* Exhibit 38. Rose testified that both Gioiosa and Janszen maintained a lifestyle well beyond their apparent means. Rose Dep. at 125, 148. He testified that they wore gold jewelry and Rolex watches, drove expensive cars and always had a lot of cash. Rose Dep. at 125, 148. He also testified that he heard rumors that Gioiosa was transporting cocaine from Florida to Cincinnati and he "tried to put two and two together" with regard to Gioiosa's lifestyle. Rose Dep. at 147-148. Notwithstanding the rumors and the inexplicable wealth, Rose continued to associate with Gioiosa and Janszen, and to use Gioiosa as a runner for his bets. Rose Dep. at 148.

[178] Janszen Dep. at 6.

[179] Janszen Dep. at 15.

[180] On January 16, 1989, Janszen pled guilty to one count of Filing a False Income Tax Return, arising from the illegal distribution of steroids, and is currently serving a six-month sentence in a halfway house. *See* Exhibit 39.

[181] Janszen Dep. at 11.

[182] Janszen Dep. at 18.

Janszen's introduction to Rose took place at Rose's home during the National League playoffs. Janszen testified he recalled that Pete Rose bet through Gioiosa on the 1986 National League playoffs between Houston and the New York Mets.[183] According to Janszen, Rose explained to Gioiosa, "It made them more exciting, . . . to bet [on the baseball playoffs]."[184] At this time in 1986, Rose's bets were being placed by Gioiosa with Ron Peters. Janszen recalled meeting Peters when he and Gioiosa visited Peters at the end of 1986.[185]

From September 1986 through December 1986, Janszen became closer to Pete Rose and was invited to go on card show trips with Rose. Janszen was first introduced to Mike Bertolini at a card show in October 1986.[186] At the shows, Rose asked Janszen to count the money.[187] He counted the cash and put it into a brown paper bag for Rose.[188] Janszen estimated that Rose made between $8,000-$12,000 in cash on each card show.[189] Yet, there are no deposits from card shows identified in Pete Rose's financial records. According to Janszen, Rose wanted to be paid in cash because "cash money did not have to be claimed."[190] On one occasion, Janszen recalled that Rose was "aggravated" when a dealer had paid him by check.[191]

Janszen's girlfriend, Danita Marcum, also got to know Pete Rose and became close friends with Rose's wife, Carol Rose.[192] Marcum would accompany Janszen to Rose's home and joined him on some of Rose's out of town trips, particularly if Carol Rose went.[193]

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[183] Janszen Dep. at 18.

[184] Janszen Dep. at 21.

[185] Paul Janszen Interview, April 5, 1989, at 1. *See* Exhibit 79.

[186] Janszen Interview, February 26, 1989, at 3. *See* Exhibit 40.

[187] Janszen Dep. at 24.

[188] Janszen Dep. at 24-25.

[189] Janszen Dep. at 24.

[190] Janszen Dep. at 23.

[191] Janszen Dep. at 23.

[192] Marcum formerly worked as a clerk for Satellite Business Systems. Presently, she is part owner with Paul Janszen in Premier Sports, a company dealing in baseball memorabilia. Marcum testified that she has never used drugs or been convicted of a felony. Danita Jo Marcum Deposition, April 4, 1989, at 4. *See* Exhibit 41.

[193] Janszen, Marcum and Rose each testified in detail concerning one such trip

Danita Marcum confirmed that she and Paul Janszen were invited to Pete Rose's home during the period of September through December of 1986.[194] She recalled witnessing Rose, Gioiosa and Bertolini placing bets. She said she saw large amounts of cash in Pete Rose's home and stated that Rose, Janszen, Gioiosa and Bertolini would spend all their time watching sports events on television.[195] Marcum described a visit to the Rose home accordingly:

> If we were sitting at Pete Rose's house, Pete would have a book, a ledger book, hard-bound, and then he would have a legal pad inside of it which he would put down his gambling wins and losses.
>
> I know we would go over there and we would sit and we'd be watching the games on TV. Or if we were over there during like the early afternoon, Pete may be looking at the paper, or even late morning, and he would tell Paul who he wanted for that day.[196]

Janszen testified, and Peters recalled, that Gioiosa and Rose had a falling out in late 1986 and early 1987.[197] As a result, Paul Janszen became closer to Rose.

Rose acknowledged that he "had [his] outs with" Gioiosa around the time of Spring training in 1987.[198] Rose explained that Gioiosa started a "ruckus" at the track while sitting in his special room and that led to the racetrack closing down the

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in December 1986 to New York for a Pete Rose/Mickey Mantle card show. Janszen Dep. at 27-30; Marcum Dep. at 9-10; Rose Dep. at 140-142. In addition, Janszen produced a photograph taken at the card show of Pete Rose, Mickey Mantle, Janszen and Gioiosa. *See* Exhibit 42.

[194] Janszen and Marcum were invited for Christmas at Pete Rose's home. Janszen recalled giving Pete Rose a music box. Janszen and Marcum were also invited out for New Year's Eve by Pete Rose and his wife. Janszen Dep. at 26-27; Marcum Dep. at 11.

[195] Marcum Dep. at 8.

[196] Marcum Dep. at 8.

[197] Janszen Dep. at 33; Peters Dep. at 23.

[198] Rose Dep. at 56.

room.[199] Rose explained that the "ruckus" resulted from Gioiosa's "drinking problem."[200]

2. Janszen and Marcum Attend 1987 Spring Training with Pete Rose

In the middle of February 1987, Rose invited Janszen and Marcum to come to his home in Florida while he was at Spring training. Janszen and Marcum accepted the invitation. Gioiosa, however, was not invited.[201] They stayed for six weeks at Rose's rented house in Tampa, Florida.[202] Janszen had quit his job at the Queen City Barrel Company and was essentially living off the proceeds of his steroid business.[203] Rose confirmed that Janszen and Marcum stayed at his house for free during Spring training.[204] Rose also testified that they stayed at his house for six weeks for "nothing . . . and I got [Janszen] a rent-a-car for nothing."[205]

Following afternoon Spring training sessions, Rose and Janszen routinely would go to Tampa Bay Downs Racetrack.[206] There, Rose introduced Janszen to Mario Nunez, a/k/a the Cuban, who was the maitre d' for the restaurant at Tampa Bay Downs.

Rose also introduced Janszen to Steve Chevashore, and Chevashore's uncle, Howard Bernstein.[207] Janszen watched Rose bet large amounts of money on horse racing. According to Janszen, Rose had Chevashore cash his winning tickets to evade his tax liability.[208]

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[199] Rose Dep. at 56.

[200] Rose Dep. at 58.

[201] Janszen Dep. at 33.

[202] Janszen Dep. at 34.

[203] Janszen Interview, February 24, 1989, at 5. *See* Exhibit 83.

[204] Rose Dep. at 57.

[205] Rose Dep. at 57, 101.

[206] Janszen Dep. at 34-35.

[207] Janszen Dep. at 35. Marcum was also introduced to these individuals. Marcum Dep. at 12.

[208] Janszen Dep. at 41-42; Janszen Interview, February 26, 1989, at 3.

Rose, however, denied that Chevashore ever "ran" bets for him at the track. Rose also testified that he bet very little money at Tampa Bay Downs and that the most he lost there was "seven hundred bucks."[209]

At Pete Rose's request, Janszen began placing Rose's bets with Steve Chevashore on various sports action, including basketball, hockey and, later, baseball.[210] Since Janszen had never previously placed bets, Rose and Chevashore explained the mechanics and language of betting to him.[211] Chevashore informed him that there were special "key words" that he should use when placing a bet over the phone in the event the phone was being tapped.[212] Specifically, Chevashore explained that Janszen should never use the word "bet" or ever refer to Pete

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[209] Rose Dep. at 52.

[210] Janszen Dep. at 44-45. During this investigation, Paul Janszen and Danita Marcum voluntarily submitted to polygraph examinations on the question of whether they placed bets on the Cincinnati Reds and baseball for Pete Rose. Danita Marcum passed the examination. In the opinion of the examiner, Paul Janszen failed the examination.

However, we have been advised that Janszen showed deception in response to a question irrelevant to his betting for Pete Rose on baseball. In the opinion of the examiner conducting that examination, deception as to one question in a polygraph examination leads to only one conclusion, *i.e.,* the witness has been deceptive.

We subsequently learned that disagreements had occurred between Janszen and the examiner during the examination which upset Janszen. In addition, in view of the fact that Danita Marcum had passed the examination and that the investigation had developed other significant corroboration of Janszen's testimony; and because Janszen volunteered to undergo another examination, we employed one of the foremost polygraphers in the United States to conduct an examination of Janszen. Janszen submitted to polygraph examinations on two consecutive days and was asked the following questions:

1. In '87, did Pete Rose use you as a middleman to place major league baseball bets?
2. In '87, did you place major league baseball bets for Pete Rose with Ron Peters?
3. In '87, did Pete Rose place bets with you as the middleman on the Cincinnati Reds to win?
4. Besides on the 1987 All-Star game, was Pete Rose wagering $2,000 per game with you?

On both days, Paul Janszen passed the examination and showed no deception.

[211] Janszen Dep. at 36.

[212] Janszen Dep. at 37.

Rose when placing a bet for him.[213] Instead, Janszen was directed to say "my friend," and Chevashore would accordingly know that this friend was in fact Pete Rose.[214] With this understanding, the Rose-Chevashore connection was cemented, using Janszen as Rose's runner. According to Chevashore, Rose specifically instructed him that Janszen would handle all of his gambling business:

> CHEVASHORE: You mean when he was in Florida—when you were there in Florida?
> JANSZEN: Right, remember how it would be?
> CHEVASHORE: I understand. I had to go over to see him in the dugout and he used to say, well didn't you see Paulie, he's supposed to take care of everything, remember that.[215]

Rose, Janszen and Chevashore had an understanding that the size of the bets Janszen was placing for Rose would always be for $2,000, "no matter what the game was, no matter when the game was being played."[216] Janszen explained that he did not have the financial capability to place these bets himself.[217] Rose denied that Paul Janszen ever placed bets for him on baseball, football or basketball games, or did anything other than possibly place a bet for him at the racetrack.[218]

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[213] Janszen Dep. at 37.

[214] Janszen Dep. at 38.

[215] Janszen-Chevashore Conversation at 5.

[216] Janszen Dep. at 37. Steve Chevashore was contacted twice during this investigation. At the initial interview, on March 9, 1989, Chevashore verified that he was first introduced to Pete Rose by "Mario, the Cuban" at the racetrack in Tampa. Although Chevashore admitted cashing Pete Rose's betting stubs at the racetrack for him, Chevashore denied handling any other betting action for either Pete Rose or Paul Janszen. Chevashore was not comfortable during the interview, and concluded by telling the investigators: "You know, the guy owes money, he should pay it. That's all I can tell you. I'm sorry, I just can't say anything. I can only tell you, I hope you solve the problem without anyone getting hurt. I hope that everybody gets taken care of. I hope it goes like that." Steve Chevashore Interview, March 9, 1989, at 3. *See* Exhibit 43.

On April 24, 1989, Chevashore was contacted again. He immediately informed the investigator that he could not speak to him because he had broken his arm "throwing a baseball." Chevashore further explained that he had not played baseball for 20 years prior to this injury and he offered no explanation as to why he suddenly went back to the game. Memorandum from Kevin Hallinan to John Dowd, April 25, 1989. *See* Exhibit 44.

As the Janszen-Chevashore relationship continued, Janszen learned the identity of the bookmaker whom Chevashore used to place Rose's bets. Janszen never knew his last name, but his nickname was Val, and he was located in Staten Island, New York.[219]

In April 1987, Rose asked Janszen to continue placing the bets with Steve Chevashore in Florida. At this time, Rose was betting on baseball, basketball and hockey.[220] Rose's betting activity is corroborated not only by the other evidence previously described, but also by documentary evidence such as betting sheets showing bets on baseball games in Rose's own handwriting;[221] Janszen's betting notebook;[222] and the numerous telephone calls to Chevashore from Janszen's home and Rose's home.[223] In mid-April 1987, Chevashore directed Janszen to place Rose's bets directly with Val in New York:[224]

> JANSZEN: This maybe started, we started our betting on 4/7/87, direct betting with Val began maybe on 4/17/87. . . .
> JANSZEN: I'm sorry 4/17/87. Our time period right now is April, May and June 1987. There is basketball and then of course there is baseball on there.[225]

Janszen's betting notebook for this time period contains the word "Val," and telephone records during this time period began to show calls to Val in New York.[226] Thereafter, Janszen, and occasionally his girlfriend, Danita Marcum, contacted Val directly to place the bets:

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[217] Janszen Dep. at 37.

[218] Rose Dep. at 84.

[219] Janszen Dep. at 38.

[220] Janszen Dep. at 44.

[221] *See* Exhibit 16.

[222] Janszen's betting notebook reflects betting on baseball from April 8 to May 12, 1987. *See* Exhibit 12.

[223] Janszen Dep. at 44. This documentary evidence is discussed more fully in a later section. *See* Sections IV-V; *see also* Exhibit 45.

[224] Janszen Dep. at 45.

[225] Janszen Interview, February 24-25, 1989, at 27.

> DOWD: Did you bet on the Cincinnati Reds baseball team at the request of Pete Rose?
> MARCUM: Yes.
> DOWD: While he was Manager of the Cincinnati Reds baseball team?
> MARCUM: Yes.
> DOWD: And you placed those bets with Ron Peters?
> MARCUM: Yes. Not as many times as Val. Just a couple of times with Ron Peters.[227]

One incident which occurred during this period illustrates that Janszen indeed did not have the financial capability to place large bets for himself. The incident occurred when Marcum, at Janszen's request, called Val to place bets on the games of May 14, 1987. Janszen asked Marcum to put "three" on the Cincinnati-Montreal game for him, in addition to the bets being placed for Rose. Marcum got confused and bet "three dimes" ($3,000). When the error was discovered, Marcum called Val, the bookmaker, directly to try to change the bet.

In a taped conversation between Paul Janszen and Steve Chevashore on December 27, 1988, Chevashore confirmed the incident, and that Rose was betting on the Cincinnati-Montreal game:

> CHEVASHORE: OK. I want you to verify this.
> JANSZEN: That, you . . . I . . . Stevie . . .
> CHEVASHORE: I just want to tell you the story because I don't know what happened that day. Danita called up and she bet 3 dimes. She said you and Pete wanted to bet 3 dimes on Cincinnati, they were playing Montreal.
> JANSZEN: Right.

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[226] *See* section V; *see also* Exhibit 45.

[227] Marcum Dep. at 19.

> CHEVASHORE: Listen to the story. So, she calls back Val and she says, Val you got to cancel the bet I made a terrible mistake.
> JANSZEN: Yeah
> CHEVASHORE: She says they don't want that thing. So Val says, Look Danita, if there's no score, I'll do you the favor. I'll cancel the bet.
> JANSZEN: Right.
> CHEVASHORE: Am I right?
> JANSZEN: Right.
> CHEVASHORE: So, Val calls up, they're leading 6 nothing, so what's Val going to do. He can't cancel, he's only a clerk, right.
> JANSZEN: Uh um.
> CHEVASHORE: He says, I'm sorry I can't do nothing about it. [PAUSE ON THE TAPE] . . . Send me the 13970, I'll send you back the 3,000 that you have to eat at the bank.
> JANSZEN: Now, what happened was that night I had asked Danita for me, I was leaving here OK, and Pete you know, what happened was Pete would call here about every night about like a quarter to seven
> CHEVASHORE: Yeah
> JANSZEN: And leave the..you know, the numbers of the teams he wanted and when I was leaving here I told her I wanted 3 on Cincinnati myself. Well, when she started you know putting in Pete's and everything else, she got confused and put 3 dimes for me and instead of 3 dimes it should have been 3 nickels.
> CHEVASHORE: Right.[228]

As it turned out, the Reds came from behind to beat the Expos 10-9, so Janszen did not lose the $3,000.

Janszen continued to place bets on baseball and other sports with Val on behalf of Rose until the middle of May 1987 when Val refused to take any more bets from Pete Rose because of Rose's unpaid debts.[229] Janszen testified that he then made arrangements at the request of Rose to place bets with Ron Peters.[230]

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[228] Janszen-Chevashore Conversation at 22-24.
[229] Janszen Dep. at 58-60.

Throughout the time Rose was placing bets with Val, the New York bookmaker, through Chevashore and Janszen, he was constantly delinquent on his gambling debts, which were due for payment on Mondays.[231] The conversation below between Janszen and Chevashore establishes the Rose-Chevashore-Val connection and Rose's failure to pay his debts on time:

> JANSZEN: OK. Well, I did and I explained to him [Rose] that you guys wanted business taken care of every Monday.
> CHEVASHORE: Right, right.
> JANSZEN: OK. Well, every Monday came around and every Monday he had another excuse for me.
> CHEVASHORE: Right.
> JANSZEN: Now, in Florida I was betting like up to 250, 3 up to 500. OK. He was doing two dimes.
> CHEVASHORE: Right, and you used to add on to it.[232]
>
> * * * * * * * * * *
>
> JANSZEN: OK, now let me explain what happened.
> CHEVASHORE: Yeah.
> JANSZEN: When, remember when every Monday, like three Mondays came and went, and there was no more money sent?
> CHEVASHORE: Right.
> JANSZEN: And Val kept saying, man, and you kept saying, you got to get things taken care of. Well, I kept going to the son of a bitch saying, straighten it up, not only pay the balance, but pay me my fuck'n money.
> CHEVASHORE: OK.

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[230] Janszen Dep. at 60.
[231] Janszen Dep. at 38, 58-59.
[232] Janszen-Chevashore Conversation at 6.

JANSZEN: And he kept coming up with excuses, Stevie, I heard every excuse.
CHEVASHORE: Paul, he used to tell me, Stevie, he's in, he flew to St. Louis, he's got a $25,000 check that is not cleared yet, remember you used to give me . . . [233]

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CHEVASHORE: I know yourself. You got yourself, you used to keep telling me stories, don't worry, he'll take care of them. You used to say to me, Jeez, could he carry it over for like three weeks or a month, but they couldn't do it, those people.[234]

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JANSZEN: Can I ask you something Steve. I just want to ask you something. Do you believe what I'm saying to you?
CHEVASHORE: Well, you know something Paulie. I'll tell you why I believe you. Because you know what they said to me. The guys in the office, the bosses, they said, this guy probably did this before with other people.
JANSZEN: Yep.
CHEVASHORE: OK?
JANSZEN: Yeah.
CHEVASHORE: They said, something is not right here.
JANSZEN: Yeah.
CHEVASHORE: Because you know what they said, if you were the culprit and wrong, he is supposed to take care of it because we did everything under his merit.
JANSZEN: Yep.
CHEVASHORE: If you were doing something wrong, which you're telling me you didn't..
JANSZEN: Yeah.
CHEVASHORE: . . . he's still supposed to take care of this because, you know, we did everything under him.

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[233] Janszen-Chevashore Conversation at 10-11.
[234] Janszen-Chevashore Conversation at 25.

> We figure, well we'll never get in trouble anything that's called up by you, he's got to stand by.
> JANSZEN: Yeah.
> CHEVASHORE: Do you understand?
> JANSZEN: Yeah.
> CHEVASHORE: Am I right?
> JANSZEN: That's absolutely right.[235]

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> CHEVASHORE: You might have gotten your balls twisted if I kept calling you to say Paul you got to send this thing because they've got to pay other people and you said Steve you're right. Danita told me all the time, Stevie, you're right. My boyfriend is trying to do the best he can you know. She says, it's his fault because you know, he didn't leave checks, he has $25,000 worth of checks that weren't any good. Hey, let me tell you something. When you gave me that check for $7500. You remember the first time, and it was no good?
> JANSZEN: And who did that check come from?
> CHEVASHORE: It was his.
> JANSZEN: That's right.
> CHEVASHORE: And you know something. He exposed himself doing that. Because you know what they did. When they first got the check when they were gonna cash it they went to the bank and it was no good and the people were looking and I think they made a photostatic copy of that too.
> JANSZEN: Oh really.
> CHEVASHORE: Yeah, I think they did.[236]

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Chevashore's statement to Janszen about Rose giving a check for $7,500 which was "no good" finds support in the records of Rose's personal account at the First National Bank of

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[235] Janszen-Chevashore Conversation at 36-38.
[236] Janszen-Chevashore Conservation at 39-40.

Cincinnati. While the bank records do not show a $7,500 check actually "bouncing," they do reveal that two checks totalling $7,500 were paid by the bank on March 31, 1987, which caused the account to be overdrawn. While the checks were not returned by the bank, Rose's account was charged a $10 "NSF" fee for each item.[237] The $7,500 represents two checks written to cash by Pete Rose and cashed at Tampa Bay Downs: one dated March 26, 1987 for $5,000; and the other dated March 29, 1987 for $2,500.[238] Rose acknowledged these were his checks.[239]

Rose explained that when something like this happens, the bank would call his accountant, Bob Chaiken, who would immediately put money into the account.[240]

In the taped conversation between Janszen and Chevashore, Chevashore discussed a mid-May 1987 conversation with Rose in which Rose acknowledged betting, but claimed he stopped during the Reds trip to New York on May 4-6, 1987:

> CHEVASHORE: I can't understand that. I mean, I have to believe you Paulie, but you know, the only thing is, when I spoke to Pete when you were there and he said, I says, Pete you know we keep falling behind this and that and you know they won't take any more action I don't know what the figure was
> JANSZEN: Yeah.

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[237] Pete Rose Account Statement at First National Bank of Cincinnati, April 13, 1987. *See* Exhibit 46.

[238] Pete Rose Personal Checks #444, dated March 26, 1987, and #445, dated March 29, 1987. *See* Exhibit 47.

[239] Rose Dep. at 172-174.

[240] Rose Dep. at 177-178. On March 31, 1987 and April 3, 1987, two additional checks, each written to cash for $6,000 and causing the account to be overdrawn, were paid by Rose's bank which charged a $10 "NSF" fee for each item. Both of these checks were cashed at a dog track in Florida. Pete Rose Personal Checks #446, dated March 31, 1987, and #447, dated April 3, 1987. *See* Exhibit 48.

Finally, Rose wrote a check to cash for $7,500 on April 6, 1987, which was cashed in New York. Pete Rose Personal Check #449, dated April 6, 1987. *See* Exhibit 48. Rose thought this check may have been for Mike Bertolini in New York. Rose Dep. at 180.

> CHEVASHORE: Maybe it was 15 or 16. He said Stevie I stopped betting when we were in New York on the last trip. He said I'm not betting any—I haven't bet in over ten days. I said so whose betting this? So, we thought it was you making
> JANSZEN: No, no
> CHEVASHORE: . . . betting everything under him.
> JANSZEN: No, no.
> CHEVASHORE: And, that's what he said to me. He said I'm not betting anymore.[241]

Chevashore, however, acknowledged that Janszen could not have been betting on his own, for several reasons:

> CHEVASHORE: He [Rose] said this [post May 6, 1987 betting] was yours personally, [but] he never said that you were betting and using his name, you know.
> JANSZEN: Stevie, do you really think that I would have been betting $2,000 every game.
> CHEVASHORE: No, you couldn't afford that.
> JANSZEN: Thank you. I mean I just hope.
> CHEVASHORE: Paulie, I don't know you, but to me I don't think [it was] you. You know why?
> JANSZEN: Ok.
> CHEVASHORE: Because it makes sense that when you used to call me up I would say when you called those guys in New York, you used to say you know, give me 2 dimes [$2,000] for Pete and add 3 [$300] for me. I remember, I mean that's the truth, you know. I understand that.[242]

Chevashore went on to express his frustration at Rose's failure to pay his debts:

> CHEVASHORE: What's he crazy, what's the matter with him, he's got money, he's not broke. But, I mean

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[241] Janszen-Chevashore Conversation at 13-14.
[242] Janszen-Chevashore Conversation at 15-16.

> Jeez, he cost me money, he caused me nothing but problems, then I had problems with you, and I you know, and he told me, he told me on the phone and his wife got mad at me and she says Carol please don't, Carol says to me Stevie, please don't call up and bother my husband. I'm not responsible for what he does you know and I just don't want you to call him. I says Carol, I won't call you anymore because I called her twice and that was it. He told me, he says, I don't do, he says, I haven't done anything since I left New York with you, with you and Paulie. He says, I have, you know, I stopped betting because with those people because I wasn't lucky, he said to me you know, whatever was done you did and you know, he didn't say that you were betting under a false pretense, under ghost bets.[243]

Rose's claim to Chevashore that Rose stopped betting after the Reds trip to New York in early May 1987 is not corroborated by any evidence developed in this investigation. Indeed, in the very conversation in which Chevashore talked about Rose's claim that he stopped betting while in New York, Chevashore also confirmed the betting placed by Danita Marcum with Val on May 14, 1987 (subsequent to the New York trip), when Marcum placed bets for Rose, and a mistakenly large bet for Janszen on the Reds-Expos game.[244]

From April 7, 1987 until May 13, 1987, Rose lost $67,900 as a result of his bets with Val.[245] Rose, however, only gave Janszen a small amount of money to cover these losses. Janszen and Marcum testified that Janszen took cash from his safety deposit box and sent it via Federal Express to Val to keep the action going for Rose.[246] Janszen also borrowed money to pay off Rose's gambling debts with Val.[247] Janszen was always concerned that Val would expose Rose and his gambling on baseball if the debts were not paid.[248] Janszen estimated that he paid Val approximately $30,000 of his own money on Rose's behalf, believing Rose would pay him back.[249] According to Janszen, Rose told him that:

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[243] Janszen-Chevashore Conversation at 15.

Janszen's telephone records from May 4-6, 1987, when the Reds were in New York, confirm that there was indeed betting at that time. During that trip, Janszen placed five calls to Val and three calls to Chevashore from various New York locations, principally the Grand Hyatt Hotel where the Cincinnati Reds stayed. *See* Section V; *see also* Exhibits 45, 77.

[244] Janszen-Chevashore Conversation at 22-23.

[245] *See* Exhibit 12.

[246] Janszen Dep. at 58; Marcum Dep. at 22.

> Paul, don't worry, I'll get you some stew, don't worry, you know, I'll have some in a couple of months, things are tight right now, you know tell the bookie, hey don't worry about it.[250]

The last bet placed with Val through Janszen was on May 13, 1987. Val was "furious" about Rose's unpaid debt as he had only received "bits and pieces of money" owed him. From the outset, Val had made numerous telephone calls to Janszen in attempts to collect what he was owed, as payments from Rose were neither timely nor complete.[251] Val finally told Janszen that he would not take any more action until Rose had settled up on his debt.[252]

Rose called Janszen the very same night that Janszen received the ultimatum from Val.[253] Rose wanted to give Janszen some teams on which to place bets.[254] Janszen informed Rose that Val would not take the action, but Rose insisted that Janszen call Val.[255] Val, in fact, did refuse to take the action, which would have had Rose winning six out of seven games.[256] The next day, Rose called Janszen thinking he had won, but Janszen told him Val had refused to take the action.[257] Rose became furious, and told Janszen that he would have been "up" had Val taken the action.[258]

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[247] Janszen Interview, February 24-25, 1989, at 40.

[248] Janszen Interview, February 24-25, 1989, at 41.

[249] Janszen Interview, February 24-25, 1989, at 41.

[250] Janszen Interview, February 24-25, 1989, at 42.

[251] Janszen Dep. at 59-60; Janszen Interview, February 24-25, 1989, at 43.

[252] Janszen Dep. at 59-60.

[253] Janszen Interview, February 24-25, 1989, at 43.

[254] Janszen Interview, February 24-25, 1989, at 43.

[255] Janszen Interview, February 24-25, 1989, at 43.

[256] Janszen Interview, February 24-25, 1989, at 43.

After this incident, Janszen continued to receive calls each day from Val and Chevashore about paying Rose's debt.[259] Janszen recalled an occasion at Rose's home when Rose received a call from Chevashore demanding payment.[260] Rose told Chevashore that Janszen was betting for himself in Rose's name and to seek payment from Janszen.[261] Rose then turned to Janszen and told him not to worry, Chevashore was afraid of him.[262]

Thereafter, Janszen's mother received a threat on Janszen's life, which is confirmed in the taped conversation between Janszen and Chevashore.

> CHEVASHORE: But I was very upset and I was, and I said Jeez, I better call Paulie's mother up and let her hear my voice so she knows that that wasn't me who called her that day because you told me she was crying, this and that, you know.
> JANSZEN: Yeah, I went over there that night and she was like in tears and
> CHEVASHORE: I understand.
> JANSZEN: She said somebody called, she said
> CHEVASHORE: Yeah
> JANSZEN: I think it's the same guy that was calling Stevie and he threatened to kill you.[263]

When questioned about the Janszen-Chevashore-Val connection, Rose denied that he ever placed bets of any kind with Chevashore and Val.[264] Rose testified that he knew Chevashore only as "Stevie," the nephew of a friend of his by the name of Howard Bernstein.[265] He testified that his only dealings with "Stevie" were to sit with him at his uncle's table at Tampa Bay Downs racetrack.[266] Rose denied knowing anyone by the name of Val.[267] Additionally, Rose denied ever placing any bets with Paul Janszen at any time.[268]

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[257] Janszen Interview, February 24-25, 1989, at 43-44.
[258] Janszen Interview, February 24-25, 1989, at 44.
[259] Janszen Interview, February 24-25, 1989, at 44.
[260] Janszen Interview, February 24-25, 1989, at 44-45.
[261] Janszen Interview, February 24-25, 1989, at 44-45.
[262] Janszen Interview, February 24-25, 1989, at 45.
[263] Janszen-Chevashore Conversation at 2.
[264] Rose Dep. at 52, 170.

When confronted with the fact that telephone records show numerous telephone calls from his home and his hotel rooms in Chicago and Pittsburgh, to Val in New York, Chevashore in Tampa, Florida, and Ron Peters in Franklin, Ohio, Rose denied making any of the calls.[269] Rose added that while they were in Chicago, the hotel was filled and Paul Janszen stayed in the "suite part" of his room.[270] Rose stated that, if there were telephone calls to Ron Peters, "I'll guarantee you that Paul Janszen was in the room."[271] Rose said that Janszen was probably in Rose's home more frequently than Rose was.[272]

D. The Rose-Janszen-Peters Betting —May, June and July 1987

Since Val refused to take any more action, Rose asked Paul Janszen to contact Ron Peters to place his bets.[273] Peters informed Janszen that he was willing to take Rose's action, but that Rose still owed him $34,000 from Rose's 1986 betting.[274] Janszen relayed Peters' message to Rose. Rose explained to Janszen that during Spring training in 1987, he had authorized his attorney, Reuven Katz, to issue a check from his account in the amount of $34,000 to Tommy Gioiosa to pay off the debt to Peters. (The check was dated March 12, 1987.)[275] Accordingly,

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[265] Rose Dep. at 52.
[266] Rose Dep. at 52.
[267] Rose Dep. at 170-171, 260.
[268] Rose Dep. at 84, 263-264.
[269] Rose Dep. at 253-266.
[270] Rose Dep. at 261.
[271] Rose Dep. at 268.
[272] Rose Dep. at 257.
[273] Janszen Dep. at 59-60.
[274] Janszen Dep. at 61; Peters Dep. at 23.
[275] Janszen Dep. at 60-61.

Janszen told Peters that if he had not been paid, it was only because Gioiosa had not given the $34,000 from Rose's check to him.[276] Therefore, to demonstrate Rose's good faith in paying his debt to Peters from the 1986 betting, Janszen obtained a copy of the $34,000 check in May 1987 from Pete Rose and gave it to Peters.[277]

Rose was specifically asked how Janszen and Peters came into possession of the $34,000 check in May 1987 and he gave the following answers:

> DOWD: [T]his check. Did you keep it at home?
> ROSE: No.
> DOWD: Okay. Can you tell me how Paul Janszen got a copy of that check in May 1987?
> ROSE: I couldn't tell you.
> DOWD: Could you tell me how Ron Peters got a copy of that check in May 1987
> ROSE: I couldn't tell you.
> DOWD: Did you give it to them?
> ROSE: No, I didn't give them no check.
> DOWD: Did Peters have access to Bob Chaiken and your checks?
> ROSE: Not to my knowledge.
> DOWD: Did you ever authorize Janszen to go down to Chaiken's office and get a copy of this check?
> ROSE: No.
> DOWD: Did you ever tell Peters he could have a copy of that check?
> ROSE: Tell who?
> DOWD: Peters. He could go down to Chaiken's office and get a copy of that check.
> ROSE: No.[278]

Peters and Janszen both independently recalled the transaction, the amount of the check issued by Chaiken and Katz, and recognized the check when it was shown to them.[279] The back of the $34,000 check reflects that the check was cashed at the bank by Gioiosa.[280] Peters denied receiving any of the money from Gioiosa.[281]

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[276] Janszen Dep. at 61-62.

[277] Janszen Dep. at 62; *see also* Pete Rose Personal Check #380, dated March 12, 1997. *See* Exhibit 49.

[278] Rose Dep. at 228.

Rose offered a different version of the $34,000 check transaction. He testified that the check was given to Gioiosa to pay Rose's gambling debts including bets placed on the 1987 Super Bowl and the NCAA basketball tournament.[282] He testified that the $34,000 debt had accumulated over a month and a half and did not cover any betting in 1986.[283] He testified that Gioiosa paid the "bookie" after the "bookie" had threatened "to burn [Rose's] house down and break my kid's legs if I didn't pay him."[284] Gioiosa conveyed the threat to Rose.[285] Rose testified that he was in Florida in Spring training at the time of the threat, so he directed his attorney (Reuven Katz) and accountant (Robert Chaiken) to issue the check payable to Gioiosa. Rose testified that he did not tell Katz or Chaiken about the purpose of the check, or notify the police or the FBI about the threat.[286] Rose explained that he did not call the authorities about the threats because he did not take them seriously:

> See, what you have to realize, John [Dowd], and you probably don't, I know you don't. But the majority of bookmakers are crybabies. You know, they could have the biggest weekend in the world and they're always complaining about they lose. In reality, they've got the world by the ass. Because no bookmakers lose.[287]

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[279] Peters Dep. at 24; Janszen Dep. at 60-61.

[280] *See* Exhibit 49.

[281] Peters Dep. at 21, 24.

[282] Rose Dep. at 72-76.

[283] Rose Dep. at 72-74; 232-233.

[284] Rose Dep. at 74.

[285] Rose Dep. at 74, 221.

[286] Rose Dep. at 221-223.

[287] Rose Dep. at 75.

Notwithstanding this vivid insight into the personality of bookmakers, Rose denied ever betting or dealing with a bookmaker.[288]

Rose's testimony that the $34,000 check of March 12, 1987 was to cover gambling losses on the 1987 Super Bowl and the 1987 NCAA basketball tournament appears to be in conflict with his other testimony that the most he ever bet was $2,000 on the Super Bowl[289] and with the fact that the 1987 NCAA tournament did not begin until March 12, 1987, the date of the $34,000 check.[290]

After seeing a copy of the $34,000 check, Peters was satisfied that Rose had attempted to pay off the debt. Thus, on May 17, 1987, Rose began betting with Peters again.[291] Peters testified that during the period from May to July 4, 1987, Janszen was betting $2,000 to $5,000 for Rose per game on baseball, including the Reds.[292] Peters testified that he would not have accepted bets if they were Janszen's, and not Rose's, due to Janszen's lack of financial ability .[293] As Peters testified:

> DOWD: And, again, were you satisfied that those bets were for Rose?
> PETERS: Yes.
> DOWD: Would you have taken those size bets from Janszen?
> PETERS: No.
> DOWD: Because he didn't have the wherewithal?
> PETERS: Right.[294]

On a few occasions, Peters explained that he also accepted bets from Danita Marcum, Janszen's girlfriend, on behalf of Rose.[295]

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[288] Rose Dep. at 60-61.

[289] Rose Dep. at 72.

[290] "Wide-Open NCAAs Begin. Upsets are to be Expected as Regional Playoffs Unfold," *The Washington Post*, March 12, 1987, at D1.

[291] Peters Dep. at 25; Section V-A(3); *see also* Exhibit 45.

[292] Peters Dep. at 24-25.

[293] Peters Dep. at 24-25.

[294] Transcript of Ron Peters Interview, March 23, 1989, at 22. *See* Exhibit 50.

[295] Peters Dep. at 26-27.

Peters told Morgan that Gioiosa was no longer betting for Pete Rose, but rather Paul Janszen was now doing the betting for Pete Rose in 1987.[296] Morgan believed that he heard Janszen's voice on the telephone approximately five times when Janszen called to place a bet with Peters. Peters handled most of the calls that came in during that time.[297]

As stated previously, Peters stated that Rose was his only betting customer for baseball.[298] Peters also testified that Rose won $27,000 in the first week of betting in May 1987 and approximately $40,000 for the month of June 1987.[299]

Janszen and Marcum testified they placed bets on baseball games, including games of the Cincinnati Reds, for Pete Rose with Ron Peters from mid-May 1987 to the All-Star Game on July 14, 1987.[300]

> JANSZEN: From maybe the third or fourth week in May, all through June, up until the All-Star break, Pete Rose bet through me with Ron Peters in Franklin, Ohio. I have phone numbers, tape recordings with Ron Peters.
> DOWD: He bet on?
> JANSZEN: Baseball, only baseball.
> DOWD: Including the Reds?
> JANSZEN: Yes, sir, every game.[301]

Janszen testified that Rose initially won close to $25,000 during the first week of betting with Peters which Janszen collected and gave to Rose.[302] During the second week, Rose lost most of the money he had won the first week. Janszen described how Rose took cash out of his kitchen cabinet, counted the money he lost, and gave it to him. Janszen then took the money to Peters.[303] Janszen testified that during June and

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[296] Morgan Dep. at 9-10.

[297] Morgan Interview at 2.

[298] Memorandum of Peters Conversation with John Dowd, April 5, 1989.

[299] Peters Dep. at 25-27.

[300] Janszen Dep. at 68-71; Marcum Dep. at 16-17.

[301] Janszen Interview, February 24-25, 1989, at 54-55.

[302] Janszen Dep. at 69-70. Peters testified that Rose won $27,000 in the first week of betting in May 1987. Peters Dep. at 26.

[303] Janszen Dep. at 70.

July 1987, Pete Rose won approximately $40,000 from Peters betting on baseball, including the Reds:[304]

> JANSZEN: Pete started betting with Ron Peters. Pete won his first two weeks. I went up there and collected $25,000, $2,000 was mine and $23,000 was Pete's. I handed Pete the money. . .[305]

* * * * * * * * * * *

> JANSZEN: Week three he loses back almost all of it. I take the money from Pete's house, from Pete's hand, take it up to Franklin, Ohio and that's week three. Week four, five, six, seven and maybe eight, Pete won every week, or if he didn't win, he might have broke even. . . . At the end of that time, he was up 40 some thousand dollars.[306]

Peters, however, refused to pay the $40,000 to Rose because Rose owed him $34,000 from losses in 1986.[307]

Janszen's and Marcum's testimony is further supported by the testimony of Jim Procter and Dave Bernstein. Procter is a body builder and acquaintance of Janszen with no criminal record. Procter recalled sitting in Janszen's car one evening in the spring of 1987 when Janszen had a series of phone calls with Pete Rose.[308] Procter recalled the conversation as follows:

> DOWD: Was this a speaker phone that you could hear that?
> PROCTER: If it wasn't a speaker phone, he had the volume up awfully high.
> DOWD: All right.

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[304] Janszen Dep. at 69-70.

[305] Janszen Interview, February 24-25, 1989, at 55.

[306] Janszen Interview, February 24-25, 1989, at 111-112. Peters also testified that Ron won approximately $40,000 for the month of June 1987. Peters Dep. at 27.

[307] Peters. Dep. at 27.

[308] James E. Procter Deposition, April 12, 1989, at 9-10. *See* Exhibit 51.

PROCTER: Because I heard it. I mean I heard the dial tone and everything. So I would assume it was a speaker phone.
DOWD: Okay.
PROCTER: He called the clubhouse; he asked, "Is Pete there."
DOWD: Clubhouse of —
PROCTER: I would imagine down at the Stadium or something. I have no idea. And they said, "One moment, please." Came back, "He's busy." That was it; end of conversation. And I won't swear to if I had heard the phone ring, but I heard another transaction between the two within like a minute's time, a minute to two minute's time.
DOWD: So he could have redialed also?
PROCTER: Right. Right. And —
DOWD: You're just not sure whether he received a call —
PROCTER: No. That's what I'm saying.
DOWD: —or he redialed. Okay.
PROCTER: But I had heard Pete's voice because I heard him —
DOWD: Pete Rose's voice?
PROCTER: Right.—make a statement—do you want me to give you the statement?
DOWD: Yes, please.
PROCTER: Okay. Because he said, "Hey, Paul, you son-of-a-bitch." And I just thought, you know, you're on pretty good terms if somebody like that calls you something like that. And he goes, "What's up?" And they started talking and he goes, "Are you ready?" And he said, yes.
DOWD: Who said, "Are you ready?"
PROCTER: Paul.
DOWD: Okay.
PROCTER: And he would read the teams off. I would hear, "Give me a dime on this; give me a dime on that." And I knew it was baseball, okay? For one because of the time of the year. And, two, at the time I knew what the teams were. And they went on with that. And when that was all through—I kind of turned my head because it

> was like, I don't want him to sit here and think I'm nosing, you know, in on this.[309]

After Janszen finished his conversation with Rose, Procter said to Janszen, "You've got to be kidding me . . . Pete Rose is betting on baseball." Janszen answered, "Yes . . . Can you believe that?" Procter then shook his head, and asked Janszen, "Has he ever bet the Reds?" Janszen responded, "He never bet against them."[310]

Dave Bernstein is a friend of Janszen who used to purchase steel drum for Mikessen Chemical and used to work out with Janszen at Gold's Gym.[311] He has no criminal record. In early 1987, Bernstein was transferred to Chicago and had to commute back and forth to Cincinnati until he closed on his new residence in late May 1987.[312] He would return to Cincinnati on Friday night every week and meet Janszen at Janszen's apartment.[313] Bernstein testified that, "Every Friday night, without fail, Pete [Rose] would call and Paul would take down whatever he wanted to bet that night and then call Ron Peters with the bets."[314] Bernstein witnessed and overheard the exchange between Rose and Janszen.[315] Bernstein also answered several calls from Rose and then passed the phone to Janszen.[316] Bernstein recognized Rose's voice when he answered the phone because he had met Rose several times through Janszen.[317] Janszen also would confirm that it was Rose on the telephone after the conversation had ended.[318]

Bernstein testified that on these Friday nights Rose called in bets on "baseball and basketball."[319] He recalled hearing bets on teams such as the "Yankees, Cardinals, Pirates, Giants, Dodgers."[320] Although Bernstein did not recall the Cincinnati Reds being mentioned during these particular betting conversations, he specifically recalled Janszen telling him during that time period that Rose bet on the Cincinnati Reds.[321]

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[309] Procter Dep. at 10-12.

[310] Procter Dep. at 12.

[311] David Bernstein Deposition, April 19, 1989, at 3-4. *See* Exhibit 52.

[312] Bernstein Dep. at 17-18.

[313] Bernstein Dep. at 18.

[314] Bernstein Dep. at 18.

[315] Bernstein Dep. at 18-21.

[316] Bernstein Dep. at 18-19.

[317] Bernstein Dep. at 19.

[318] Bernstein Dep. at 19.

[319] Bernstein Dep. at 21.

Bernstein also went to several Reds games with Janszen where he witnessed Janszen give Rose hand signals indicating how Rose stood on his bets.[322] Bernstein explained that Janszen, from their seats behind home plate, would indicate with his fingers and a thumbs up or down sign how many games Rose was winning and how many he was losing.[323] Rose would come out of the dugout and look over at them when he wanted an update on the scores.[324] Janszen kept abreast of the scores by calling a sports hot line from a pay phone at the stadium.[325] During the same time period that Bernstein observed the hand signals between Rose and Janszen, *i.e.*, April-May 1987, the stadium scoreboard which reported scores of other baseball games was out of order. According to Jon Braude, the Cincinnati Reds Director of Information, the scoreboard was out of order for 18 games during the period of April 17 to May 28, 1987.[326] When confronted with this allegation, Pete Rose said it was preposterous because "the scoreboard has *never* not worked."[327]

Rose testified that Paul Janszen never placed bets for him on any sports activity, nor was he aware that Janszen ever bet at all.[328] This testimony is contradicted by Donald Stenger.

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[320] Bernstein Dep. at 21.

[321] Bernstein Dep. at 21-22.

[322] Bernstein Dep. at 27-28.

[323] Bernstein Dep. at 27-28.

[324] Bernstein Dep. at 27-28.

[325] Bernstein Dep. at 28. The various telephone records of both Janszen and Rose reveal extensive phone calls to the sports information number, 976-1313, at various area codes, including the 900 toll number. *See* Section V; *see also* Exhibit 45.

[326] Cincinnati Reds News Releases, March 23, 1987, and May 22, 1987. *See* Exhibit 57.

[327] "Reports on Rose Signals Clarified by Magazine," *The New York Times*, March 30, 1989. *See* Exhibit 58.

[328] Rose Dep. at 84, 263-264.

Stenger recalled having dinner with Pete and Carol Rose, Janszen, Danita Marcum and Stenger's girlfriend at a Chinese restaurant in Philadelphia when the Reds were in town to play the Phillies in 1987.[329] While at the restaurant, Janszen pulled out a sheet of paper with betting information on it and went to make a phone call. Stenger said there was no discussion about betting, or what was on the sheet. Stenger believes that the four or five games listed on the sheet were basketball games. He concluded this based on his personal opinion that Rose would never bet on baseball.[330]

Janszen also recalled the incident, but adds that Rose asked him "how are we doing?" on the bets for that day. Janszen then got up from the table to call the sports information line.[331] Rose corroborated being in the restaurant. He testified that every time he goes to Philadelphia he eats "at the Chinese place downtown."[332] Rose could not recall if Stenger ever ate with him at that restaurant.[333]

E. The Rose-Janszen Debt Dispute

As previously noted, Pete Rose owed Paul Janszen money because Janszen used his personal funds to pay off some of Rose's gambling debts.[334] Janszen estimated that when Rose's betting with Peters stopped in July 1987, Rose owed Janszen approximately $44,000.[335] Rose told Janszen he could get this money by collecting it from Peters.[336] Janszen stated that:

> Pete's attitude is well, Paul, I owe you all this money, and . . . the bookie in Franklin owes me all this money. So, guess what, Paul, just get the money, get your money from the bookie. He is saying . . . I won forty, I lost forty, as far as I am concerned I am even. And that's how that worked. I said

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[329] Stenger Interview at 7-8.

[330] Stenger Interview at 8.

[331] Memorandum of Janszen Interview, May 6, 1989. *See* Exhibit 82.

[332] Rose Dep. at 139.

[333] Rose Dep. at 139.

[334] Janszen Dep. at 58-59.

[335] Janszen Interview, February 24-25, 1989, at 112.

[336] Janszen Interview, February 24-25, 1989, at 57.

> Pete you don't go into Shillitos Department Store, take something out and tell them, hey, go get the money from my brother, he owes me money. That is not how it works.[337]

Subsequently, Peters recognized Rose's debt to Janszen, but only paid Janszen approximately $6,000—the difference between Rose's $34,000 debt and his $40,000 winnings.[338]

In March 1988, Janszen attempted to get Rose to pay him the money still owed to him.[339] He and Marcum had a meeting with Reuven Katz, Rose's attorney.[340] Janszen told Katz that he was in trouble and he needed money to hire a defense lawyer.[341] Janszen said that Katz recommended several lawyers to Janszen.[342] Janszen told Katz he needed some of the money he loaned Rose. Janszen told Katz about the gambling he had done for Rose, including betting on the Reds.[343] According to Janszen, Katz did not question Janszen's account.[344] Janszen said that Katz merely put his head down, made a gesture with his hands and said, "That's it; it's over."[345] Janszen said that Katz did not accuse Janszen of lying about this matter.[346]

Janszen's meeting with Katz took place about a week after Janszen was first contacted by the Federal Bureau of Investigation.[347] The FBI was not aware that Janszen was going to meet with Katz.[348] In the meeting with Katz, Janszen volunteered that he would "protect" Rose with the federal authorities.[349] Janszen testified that Katz replied, "I [Janszen] had to do what I felt I had to do."[350]

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[337] Janszen Interview, February 24-25, 1989, at 57-58.

[338] Peters Dep. at 27-28.

[339] Janszen Dep. at 71, 73.

[340] Janszen Dep. at 74.

[341] Janszen Dep. at 74.

[342] Janszen Dep. at 74. Janszen contacted the lawyers Katz suggested but did not retain any of them. Janszen Dep. at 74.

[343] Janszen Dep. at 75-76.

[344] Janszen Dep. at 76.

[345] Janszen Dep. at 76.

[346] Janszen Dep. at 76.

[347] Janszen Dep. at 77.

[348] Janszen Dep. at 77.

Janszen said that Katz told him he would talk to Rose about the matter while in Florida.[351] According to Janszen, Katz later instructed Janszen to go to an accountant's office where there would be a check waiting for him.[352] Janszen did so and picked up a $10,000 check drawn on Rose's account, payable to Paul Janszen, dated March 18, 1988.[353] The check bears the notation "For loan."[354] Janszen testified that Katz said, "We can just make it look like it's a loan."[355] However, according to Janszen, Katz never asked Janszen to sign a promissory note for the $10,000, and Janszen never considered it to be a loan.[356]

We inquired of counsel for Rose whether Mr. Katz would be available to be interviewed. Counsel for Rose responded that Katz was available to answer questions on a non-privileged basis. Because of the difficulty in distinguishing between privileged and non-privileged information, we decided, out of prudence and respect for the attorney-client privilege between Rose and Katz, to pursue the information from non-privileged sources. If you should decide to send this report to Rose and his counsel, Katz may wish to take the opportunity to respond to the statements of Janszen.

Rose testified that the $10,000 check was issued to Janszen because "Paul asked me to loan him some money because he needed a lawyer."[357] When asked whether Janszen called him to discuss the request, Rose stated that Janszen called Reuven Katz, not Rose.[358] Rose testified Katz called him and told him Janszen wanted $20,000. Rose told Katz he would loan Janszen half that amount because he did not know if Janszen had enough money to pay back $20,000.[359] Katz told Rose that Janszen needed the money for a lawyer. When Rose asked Katz why Janszen needed a lawyer, Katz told Rose, "I don't know."[360] When Rose was asked whether Katz told him that Janszen had claimed Rose owed him money, Rose testified, "I don't remember that."[361] Rose did not ask Janszen to sign a promissory note for the $10,000 because he thought Janszen was a friend.[362] Rose also said that the check was as good as a note because it contained the notation "loan."[363]

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[349] Janszen Dep. at 76-77.

[350] Janszen Dep. at 76-77. Late in 1988 Janszen began to cooperate with the government in its continuing drug and tax evasion investigation. As part of this cooperation, Janszen agreed to wear a hidden microphone in a meeting with Ron Peters. This transaction lead to Peters' being charged with conspiracy to distribute cocaine. Needless to say, since that time, Peters has not considered Janszen a friend. Paul Janszen Interview, February 26, 1989, at 2.

[351] Janszen Dep. at 78.

[352] Janszen Dep. at 78.

[353] Janszen Dep. at 78-79; *see also* Pete Rose Personal Check #296, dated March 18, 1988. *See* Exhibit 59.

[354] *See* Exhibit 59.

[355] Janszen Dep. at 78-79.

[356] Janszen Dep. at 79.

On January 20, 1989, Paul Janszen wrote a letter to Reuven Katz which referred to their meeting the previous year about the money Rose owed Janszen.[364] In the letter, Janszen states that he has the feeling that Katz and Rose are taking a "non-committal stance" regarding the money owed Janszen because they thought it would "discourage" him and he would "dry up and blow away."[365] Janszen went on to write:

> A personal loan was made to Pete Rose by myself in June 1987. His promise to start paying me back came and went each month with a new excuse why he couldn't come up with any. He kept falling back on the same promise that if he didn't pay me by December 1987, he would use money from the sale of his 4192 Mizuno bat he broke Ty Cobb's record with to settle up with me. It never happened. Then when his

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[357] Rose Dep. at 287.

[358] Rose Dep. at 287-288.

[359] Rose Dep. at 288.

[360] Rose Dep. at 288.

[361] Rose Dep. at 291.

[362] Rose Dep. at 291.

[363] Rose Dep. at 292.

[364] Janszen voluntarily provided a copy of this letter to the investigators. Letter to Reuven Katz from Paul Janszen, January 20, 1989. *See* Exhibit 60.

[365] Letter to Reuven Katz from Paul Janszen, January 20, 1989, at 1. *See* Exhibit 60.

> wife started building their new house in Florida, the idea of paying me back seemed to vanish from his mind. Only after I contacted you in March 1988 did I receive partial payment by check.
>
> * * * * * * * * * *
>
> For years I heard the stories that Mr. Rose didn't like paying his debts and had left several people hanging out to dry. Well they certainly were true.
>
> * * * * * * * * * *
>
> Well Reuven, so much for my personal feelings about the man. My intentions are that if I can't settle this quietly and quickly out of court, then let's jump into the ring and take it to court. What we have here is a situation that calls for the truth, the stuff that our court system is based on. I know Mr. Rose can't back up his stories with proof. I can!
>
> * * * * * * * * * *
>
> It's time for him to take some responsibility for his actions and if need be get some professional help along the way before he has nothing left.[366]

When shown Janszen's letter during his deposition, Rose's first comment about it was, "We felt that to be kind of amusing, the stuff he said in there."[367] Rose's attorney, Robert Pitcairn, then interjected that he did not find anything in Janszen's letter amusing.[368] When asked what he found amusing in the letter, Rose responded that he found amusing such things as Janszen's statements in the letter that he, Janszen, "spent hundreds of hours working" in Rose's house;

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[366] Letter to Reuven Katz from Paul Janszen, January 20, 1989, at 1-2.
[367] Rose Dep. at 293.
[368] Rose Dep. at 294.

that Janszen had built a play area; and that Rose had borrowed money from Janszen.[369]

The response to Janszen's letter was written by Katz's partner, Robert Pitcairn, to Janszen's attorney, Merlyn Shiverdecker.[370] Pitcairn requested specifics about "the alleged loan, the purpose of the loan, and the amount [Janszen] believes is owed." Pitcairn promised Shiverdecker that if provided the "particulars of the transaction" he would "analyze it" and respond "promptly."[371]

Janszen's attorney Shiverdecker replied to Robert Pitcairn by letter on March 2, 1989, requesting Pete Rose to pay Janszen the balance due him of $33,850 "which Paul paid to others on Pete's behalf and at Pete's direction in May and June of 1987."[372] Shiverdecker added that "[t]he details of these expenditures are obviously as well known to Pete as they are to Paul." Shiverdecker asked to be advised of Rose's position at Pitcairn's earliest convenience.[373] Janszen does not believe that Pitcairn ever responded to this letter.[374]

Rose testified that the assertion that Janszen paid $33,000 on Rose's behalf, for which Rose is responsible, is "ridiculous" and Janszen was "dreaming."[375] Rose went on to recite various debts which he claimed Janszen owed to him; $10,000 for the March 1988 check which Rose claimed was a loan to Janszen; $5,000 for a check which he says Janszen gave him at the end of 1988 for autographing baseballs and bats, which check Rose said bounced; and $25,000 for signing other baseballs and pictures.[376]

Janszen stated that in 1988 it became clear that Rose would not pay him anything other than the March 1988 check for $10,000. Therefore, Janszen tried to minimize his losses by getting Rose to autograph as many baseball bats, balls, and other items as possible which Janszen planned to sell through his memorabilia business. Janszen has never received a demand to repay the $10,000 he received in March 1988, which Rose testified was a loan.[377]

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[369] Rose Dep. at 294-295.

[370] Letter to Merlyn Shiverdecker from Robert Pitcairn, January 25, 1989. *See* Exhibit 61.

[371] Letter to Merlyn Shiverdecker from Robert Pitcairn, January 25, 1989.

[372] Letter to Robert Pitcairn from Merlyn Shiverdecker, March 2, 1989. *See* Exhibit 62.

[373] Letter to Robert Pitcairn from Merlyn Shiverdecker, March 2, 1989.

[374] Janszen Dep. at 80.

[375] Rose Dep. at 298.

[376] Rose Dep. at 298, 282-286.

Rose's testimony that he does not owe Janszen any money is contradicted by Mike Bertolini in his telephone conversation with Paul Janszen of April 4, 1988. In the conversation Bertolini acknowledges Rose's debt and asks whether Rose has paid any of it:

> JANSZEN: Did you ever get settled up with Pete?
> BERTOLINI: About what?
> JANSZEN: The money?
> BERTOLINI: Fuck'n we're working it out and shit, I don't know, the fuck. Did you ever?
> JANSZEN: He still owed me about 12 grand.
> BERTOLINI: So, he paid you about 38?
> JANSZEN: Huh?
> BERTOLINI: How much, did he pay you anything yet?
> JANSZEN: No, well that's all that, what he did was he signed a bunch of autographs for me.
> BERTOLINI: I hear you
> JANSZEN: And, you know, plus he wrote some checks that I had cashed that I had sent up to the guy.
> BERTOLINI: Yeah.
> JANSZEN: So, he's into me for about anywhere from, I don't know, once you figure out all the autograph stuff,

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[377] Janszen Dep. at 80. Rose testified that Danita Marcum, not Janszen, took the bats over to his house to be autographed. Rose said that "Paul Janszen has never looked me in the eye and said I owe him anything." Rose also said that Marcum once "barged" into his house to get bats signed and his wife told her to get out. Rose Dep. at 306-307. Rose said Janszen "went crazy" and made threatening statements to Charlotte Jacobs (Carol Rose's friend) about Rose's family. Rose Dep. at 307.

Janszen has acknowledged that when his girlfriend, Danita Marcum, was thrown out of Rose's house, he became enraged. Janszen has stated several times that he feels Pete Rose used him. Janszen made no attempt to hide the fact that this incident involving his girlfriend caused him to lose his temper.

> he probably owns me about, anywhere from like 10-12,000.
> BERTOLINI: Yeah, I hear you..[378]

Rose testified that with regard to the entire investigation, "The whole thing started with Paul Janszen."[379] Rose said that Janszen "sort of resented the fact that I didn't want to hang around with him any more after I found out he was in drugs."[380] Rose said that, "People have a tendency to say things they really don't—that really aren't true when their ass is on the chopping block."[381] Rose said that Janszen is trying to "blackmail" him and ruin his name in Cincinnati.[382]

Rose said we should talk to Charles Sotto and Charlotte Jacobs, who can provide more information about Janszen in this regard.[383] Sotto was interviewed and stated he had no knowledge of sports betting by Pete Rose. Regarding Janszen, Sotto told us that Janszen had told him of his visit to Reuven Katz; that Janszen needed money to pay an attorney; and that Janszen had cooperated with the FBI.[384] Jacobs was interviewed and she confirmed that Janszen called her and was very upset about Danita Marcum being kicked out of Rose's house. Jacobs had no knowledge of Pete Rose's betting activities.[385]

Rose summed up his opinion regarding people who have said he bet on baseball with the following comment:

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[378] Janszen-Bertolini Conversation at 7-8.

[379] Rose Dep. at 302-303.

[380] Rose Dep. at 303.

[381] Rose Dep. at 309.

[382] Rose Dep. at 302-304.

[383] Rose Dep. at 302.

[384] Charles Sotto Interview, May 5, 1989. *See* Exhibit 80.

[385] Charlotte Jacobs Interview, April 24, 1989, at 1-3. *See* Exhibit 63. In the interview, Jacobs corroborated an incident also related to us by Janszen which occurred when Rose and Janszen went to a baseball card show in Cleveland in February 1988. The incident involved Carol Rose's and Danita Marcum's suspicions about a third woman traveling with Janszen and Rose. As a result of this incident, Carol Rose would not allow Janszen, or Marcum, to come into the Rose home. Jacobs Interview at 1-2.

> Those guys could have a quintet in the last three months. Because they're all singing. They're all singing a lot. They have to sing or they'll be in Sing Sing.[386]

Rose added that "I'm guilty of one thing in this whole mess, and that's I was a horse shit selector of friends."[387]

On March 21, 1989, Mark Stowe, the Assistant Clubhouse Manager of the Reds, told the investigators that he is acquainted with Paul Janszen and Danita Marcum and last saw them when they had lunch together during the summer of 1988.[388] Stowe stated that during the lunch, Janszen said that Rose owed him money and that Rose bet on baseball.[389] Stowe also stated that in the spring of 1989, when Pete Rose returned from his meeting at the Commissioner's office, Rose told Stowe that Janszen was saying Rose owed him money, when it was Janszen's "bookie" who owed money to Janszen. Rose told Stowe that he was betting through Janszen, and when Rose won, the "bookie" would not pay Janszen.[390] Rose told Stowe that if it were Rose's "bookie" it would be different, but since it was not his "bookie," he does not owe Janszen anything.[391] Rose also said that Janszen was claiming that Rose bet on baseball, but that he, Rose, did not.[392]

Rose's admission to the Reds Assistant Clubhouse Manager in March 1989 that he was indeed placing bets with Paul Janszen contradicts Rose's repeated assertions in his deposition that he never bet with Janszen and was not aware of any betting by Janszen.

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[386] Rose Dep. at 309.

[387] Rose Dep. at 307.

[388] Mark Stowe Interview, March 21, 1989. *See* Exhibit 64.

[389] Stowe Interview at 1.

[390] Stowe Interview at 1.

[391] Stowe Interview at 1.

[392] Stowe Interview at 1. On April 27, 1989, Stowe was again contacted and was read the memorandum prepared regarding his March 21, 1989 interview. Stowe stated that to the best of his memory it was correct. The next day, April 28, 1989, Stowe contacted investigator Joseph Daly, and told Daly that the statement in the memorandum regarding what Rose said about betting with Janszen "sorta" sounds like what he heard Rose say. Memorandum of Telephone Conversation with Mark Stowe, April 28, 1989. *See* Exhibit 65.

F. Other Subjects Covered In Pete Rose's Deposition

Throughout the preceding narrative, we have included excerpts from Pete Rose's deposition, which was taken on April 20-21, 1989. In addition to the subjects already covered in the narrative, Rose was asked during the deposition about the following additional subjects.

1. Rose's Relationship with Joseph Cambra

Joseph Cambra, from Somerset, Massachusetts, was charged with being a bookmaker in 1984, and subsequently pleaded guilty to gambling charges in 1986.[393] Pete Rose acknowledged meeting Cambra during Spring training in West Palm Beach, Florida, in February 1984, while Rose was a player with the Montreal Expos.[394] Rose stated that he did not know Cambra was a bookmaker, or that he had been convicted of bookmaking, until about two weeks prior to his deposition on April 20, 1989.[395] Rose denied ever betting with Cambra or going to the racetrack with him.[396] Rose testified that the only financial transaction he had with Cambra involved a real estate deal in which Cambra told Rose he could double his money. As part of the deal, Rose gave Cambra $19,800, but the deal fell through and Cambra returned the money in cash.[397] Rose believed the money was returned to him in Montreal, during 1984, several months after he had given it to Cambra.[398]

Cambra stated that he has had a real estate license in Massachusetts and that Rose gave him two checks totalling $19,300 for a real estate deal in which Rose was going to participate.[399] Cambra provided copies of the checks. Both are dated July 5, 1984. One is for $10,300, payable to Joe Cambra, and drawn on Rose's personal account at First National Bank of Cincinnati. The second is a cashier's check drawn on the Royal Bank of Canada, payable to Joe Cambra, for $9,000.[400] Cambra stated that the real estate deal could have been very lucrative, but it "fell through" and the money was returned to Rose.[401] Cambra would not provide any details about the proposed real estate deal. Cambra's attorney stated that for personal reasons on Cambra's part, as well as possible criminal prosecution, no details surrounding the real estate transaction could be provided.[402] Cambra could also not explain how he returned the money to Rose. Cambra denied that the police had seized a check issued to him from Pete Rose in a gambling raid on Cambra's home in November 13, 1984.[403] Cambra also denied that Rose ever bet on baseball with him, but stated that he could not answer whether Rose ever bet on other sports with him.[404]

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[393] Joseph Cambra Interview, April 27, 1989, at 1. *See* Exhibit 66.
[394] Rose Dep. at 7-8.
[395] Rose Dep. at 8-9.
[396] Rose Dep. at 18.
[397] Rose Dep. at 9-10, 18-19.
[398] Rose Dep. at 18-19.

Rose described Cambra as a "dear friend" and "a down-to-earth guy."[405] Cambra asked Rose for a Reds World Series ring. Rose wrote a letter to John Scarpellini of the Balfour Ring Company requesting that World Series ring be made for Cambra.[406] Rose denied that this was a gift for Cambra and stated that Cambra paid $3,150 for the ring.[407]

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[399] Cambra Interview at 3.

[400] *See* Exhibits attached to Cambra Interview.

[401] Cambra Interview at 3.

[402] Cambra Interview at 3.

[403] Cambra Interview at 3.

[404] Cambra Interview at 4.

[405] Rose Dep. at 11.

[406] Letter to the Balfour Ring Company from Pete Rose, March 24, 1989. *See* Exhibit 67.

[407] Rose Dep. at 15. Rose stated that he traded his original 1975 World Series ring to Barry Halper, a memorabilia collector and part owner of the New York Yankees, for a "big huge bust" of Ty Cobb. Rose added that there were only two of its [the bust's] kind in the world. Rose Dep. at 15-16.

In April 1989, Rose put his three World Series rings on display at a local Cincinnati bank which he said "was just one way of clearing up all the bullshit . . . about my ring is gone for a gambling debt." Rose Dep. at 277-278. However, Cambra stated that he asked Rose if he could have a copy of Rose's 1975 World Series ring. Cambra confirms that Rose wrote a letter to Balfour requesting that a copy of the ring be made.[408] Cambra stated that he requested that a diamond be put in the ring, and that he paid Balfour $3,141 for it.[409]

John Scarpellini, Vice President of Balfour (whom Rose stated he knew very well[410]), stated that a Balfour employee, who was also Joe Cambra's nephew, wanted Scarpellini to contact Rose in reference to the loss of Rose's 1975 World Series ring.[411] Scarpellini eventually spoke to Rose, who requested that a replacement 1975 ring be made. Scarpellini recalled later receiving a letter from Rose requesting that the ring be made for Cambra.[412]

Rose stated that he has seen Cambra five to six days a year from 1984 to 1989, during Spring training. When Cambra comes to Florida, Rose asks the Reds traveling secretary to get Cambra a room.[413] Cambra has visited Rose's new home in Florida.[414] When asked whether Cambra was ever in the Reds' clubhouse, Rose responded, "Well, it's all according to what your definition of the clubhouse is."[415] Rose stated that Cambra has been in his office, but not in the part of the clubhouse where the players are.[416]

Rose confirmed that Barry Halper owns the authentic 1975 ring, and the ring put on display was a new ring Rose had made. Rose Dep. at 276-277. Rose denied that the original ring had been used to pay off a gambling debt. Rose Dep. at 278.

[408] Cambra Interview at 2.

[409] Cambra Interview at 2.

[410] Rose Dep. at 14.

[411] Letter to Ed Durso from John Scarpellini, April 17, 1989, at 1. *See* Exhibit 68.

[412] Letter to Ed Durso from John G. Scarpellini, April 17, 1989, at 1.

[413] Rose Dep. at 20-22.

[414] Rose Dep. at 21.

[415] Rose Dep. at 22.

[416] Rose Dep. at 22-23.

2. Rose's Role in the January 1987 "Pik-Six" at Turfway Racetrack

On April 6, 1989, Tommy Gioiosa was indicted on five felony counts alleging violations of the drug and tax laws.[417] Counts four and five relate to the Pik-Six at Turfway Racetrack on January 16, 1987.[418] Those counts allege that Gioiosa falsely represented to the IRS that he was the sole winner of the $47,646 Pik-Six ticket at Turfway on that day, when in actuality someone else was the true holder of the winning ticket.[419]

According to Paul Janszen, Pete Rose owned 75% of the winning ticket, and Janszen and Gioiosa split the remaining 25%.[420] The ticket cost approximately $2,000.[421] Rose paid approximately $1,500, and Gioiosa and Janszen paid approximately $250 each for their respective shares.[422] Janszen stated that Gioiosa cashed and signed for the winning ticket so that Rose could avoid having to report his winnings.[423]

When asked whether he was a winner on the January 16, 1987 Pik-Six ticket, Rose said that he was not.[424] Rose also said Gioiosa never cashed a Pik-Six winning ticket for him.[425] Rose further testified that he did not recall ever being at Turfway Racetrack on January 16, 1987.[426]

After this testimony, Rose was shown two $10,000 checks drawn on his account, payable to cash, signed by him, dated January 16, 1987 and cashed the same day at Turfway.[427] Upon examining these checks, Rose acknowledged that they established that he was at Turfway on January 16, 1987, the date of the Pik-Six.[428] However, he further testified that the checks were "good" and "great" because they established that he did not win the January 16, 1987 Pik-Six.[429] Rose explained that if he had won the Pik-Six, he would not have cashed the two $10,000 checks because he would not have needed the funds.[430] Rose, after further questioning, agreed that the Pik-Six winnings could not have been collected until after the eighth race because the Pik-Six requires the bettor to pick the winners for the third through the eighth races.[431]

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[417] *See* Exhibit 7.
[418] *See* Exhibit 7.
[419] *See* Exhibit 7.
[420] Paul Janszen Interview, March 8, 1989, at 2. *See* Exhibit 69.
[421] Janszen Interview, March 8, 1989, at 2.
[422] Janszen Interview, March 8, 1989, at 2.
[423] Janszen Interview, March 8, 1989, at 2.
[424] Rose Dep. at 187.
[425] Rose Dep. at 135.
[426] Rose Dep. at 187.
[427] Rose Dep. at 188.

3. Rose's Role in Winning the January 1989 "Pik-Six" at Turfway Racetrack

On January 25, 1989, Rose and Jerry Carroll, the Owner and Chairman of Turfway Racetrack, had a winning Pik-Six ticket which paid $265,669.20.[432] Rose paid $1,340 for his half of the ticket.[433] Neither Rose nor Carroll, however, signed for the ticket.[434] Instead, Arnie Metz, a former groundskeeper for the Cincinnati Reds and runner for Rose, signed for the ticket.[435] Rose testified that Metz was "in for 15%."[436]

Although Metz signed for the ticket, he did not cash it for two days, when Rose or Carroll told him to do so.[437] Metz delivered $109,000 to Rose, of which Rose gave Metz approximately $8,000.[438] Rose put the remaining money in a satchel and took it to Spring training in Florida.[439]

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[428] Rose Dep. at 188.

[429] Rose Dep. at 188.

[430] Rose Dep. at 188-192.

[431] Rose Dep. at 194-195.

[432] Rose Dep. at 34-38.

[433] Rose Dep. at 36.

[434] Rose Dep. at 38.

[435] Rose Dep. at 24-26, 38.

[436] Rose Dep. at 36.

[437] Rose Dep. at 43. Transcript of Arnold Metz Interview, April 19, 1989, at 61-64. *See* Exhibit 70.

[438] Rose Dep. at 44.

[439] Rose Dep. at 43-44. Rose said he used the $109,000 to buy his wife a $23,000 ring; a golf cart for $3,600; and a tennis court for $24,000. Rose Dep. at 206. Rose stated that he still has $25,000, and that the remainder was spent in Florida. Rose Dep. at 206.

Although Rose admitted winning the 1989 Pik-Six during his deposition, prior to this deposition he had denied that he was a Pik-Six winner to the press.[440] Rose also had told Commissioner Giamatti, former Commissioner Ueberroth and others, at a meeting at the Commissioner's office in New York on February 20, 1989, that he was not a winner on the January 25, 1989 Pik-Six. When asked about his denial to the Commissioner and the others at the February 20, 1989 meeting, Rose responded that he did not recall making such a statement.[441] He further stated that the only mention of the Pik-Six at the meeting that he recalled was a statement by Mr. Ueberroth or Commissioner Giamatti to Rose that "we don't care about Pik-Six's."[442]

IV. DOCUMENTARY EVIDENCE

A. Pete Rose's Betting Sheets

We obtained from Paul Janszen copies of three pages of handwritten records which Janszen took from Rose's home.[443] Danita Marcum testified that she recognized the handwriting on these sheets as Pete Rose's because she recalled being at Rose's home and watching him writing everything down "in his book."[444] Janszen also testified that Rose used to record his bets on a notepad.[445]

The first of these three pages contains the date "April 9, 1987" at the top, followed by the team pairings for four Major League Baseball games and four NBA basketball games. The lower half of the page contains individual team names and team pairings, with the letter "L" or "W." This part of the page includes three baseball pairings including "Cin at Mont W," "Philly at Atl. L" and "LA at Houst L."

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[440] Rose Dep. at 200-204.

[441] Rose Dep. at 50.

[442] Rose Dep. at 50.

[443] *See* Exhibit 16. Rose denied that he ever kept records of his gambling activities. Rose Dep. at 82.

[444] Marcum Dep. at 16.

[445] Janszen Dep. at 43.

The second sheet has baseball and basketball teams listed for April 10, 1987 and April 11, 1987. Each team has a "W" or "L" next to it. Some of the basketball teams have what appear to be point spreads, *e.g.*, "Utah-5L." Cincinnati is listed on both April 10 and April 11, 1987 along with a "W." The Reds beat San Diego on both of these dates.[446]

The third sheet is undated and contains names of teams and pairings for college and professional football games, *e.g.*, "W Miami vs. Okl -3." Next to three of the college teams is the notation "5 dimes."

On March 16, 1989, Pete Rose gave handwriting exemplars to Richard E. Casey, a retired FBI agent and experienced handwriting analysis expert. Mr. Casey was also provided with contemporaneous writings of Pete Rose for 1987. Mr. Casey compared Rose's handwriting exemplars and contemporaneous writings with the three handwritten sheets described above. His conclusions are:

> 1. It is my opinion that Pete Rose, whose exemplar handwriting, handprinting and numerical entries appear on [the samples provided Mr Casey], is the writer of the handprinted and numerical entries on [the April 9 sheet and the undated sheet].
>
> 2. It is also my opinion that Pete Rose is the writer of the handprinted and numerical entries on the [April 10 and 11 sheet], with the exception of the three fractional entries, 8-1/2, 9-1/2, and 9-1/2, appearing in the lower right hand margin of [the document].[447]

Paul Janszen and Danita Marcum provided handwriting exemplars to James R. Dibowski of Cincinnati, Ohio, a retired postal inspector and experienced handwriting analysis expert.[448] Mr. Dibowski concluded that the three above-described sheets were not in the handwriting of either Marcum or Janszen.[449]

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[446] 1988 Cincinnati Reds Media Guide at 72 (listing 1987 game results). *See* Exhibit 21.

[447] Report of Richard E. Casey, April 11, 1989, at 5. *See* Exhibit 71. Mr. Casey could not "identify or eliminate" Pete Rose as the writer of the fractional entries, but "some similarities were noted which suggest the possibility that Rose is also the writer of those entries." Casey Report at 5.

B. Paul Janszen's Betting Notebook

Paul Janszen provided us with copies of 22 pages from a notebook which he has testified reflects the bets that he (or Danita Marcum) placed for Pete Rose on basketball, baseball and hockey from April 17, 1987 until May 13, 1987.[450] The individual pages of the notebook are dated and contain team names grouped according to sport, *e.g.*, baseball, basketball and hockey. Each team listed is preceded by a "W" or "L," and followed by a number such as "+2000" or "-2000." Most of the days contain an entry for the Reds. The last sheet from the notebook contains an entry "10,900 Val." Mr. Dibowski concluded that it was "probable" that the handwriting on the 22 pages was that of Janszen, except for 3 entries written by Marcum.[451]

C. Ron Peters' Betting Records

We obtained copies of numerous documents which Ron Peters identified as his betting records for periods in 1987.[452] Peters said he normally threw out all betting records as quickly as possible, but maintained these records because he anticipated a dispute with Rose over money since Peters never intended to pay Rose all his 1987 winnings due to Rose's $34,000 debt to Peters from 1986.[453] The records are almost all in Peters' handwriting, with occasional sheets written by Dave Morgan, Peters' girlfriend, or others who worked at Peters' restaurant and answered the phone.[454] Peters identified one sheet as a "recap" sheet from Janszen.[455] Janszen identified the sheet as being in his handwriting.[456]

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[448] Mr. Dibowski spent twenty-seven years as an Examiner of Questioned Documents in the Postal Inspection Service Crime Laboratory in Cincinnati, Ohio, serving as director of the Crime Laboratory for 14 years. Since his retirement in 1976, Mr. Dibowski has assisted both state and federal prosecutors in the prosecution of criminal cases.

[449] Report of James Dibowski, March 16, 1989, at 1. *See* Exhibit 72.

[450] Janszen Dep. at 44; *see* Exhibit 12.

[451] Dibowski Report at 1-2.

[452] *See* Exhibit 13.

[453] Memorandum of Ron Peters Interview, May 1, 1989, at 1. *See* Exhibit 73.

One of Peters' sheets has the notation "Pete -41,800," which Peters explained meant that Rose owed Peters $41,800. Numerous other sheets list baseball games, amounts bet, and amounts won or lost.

D. Analysis of Betting Records

Bill Holmes, a retired FBI agent with 20 years' experience in gambling investigations and analysis of gambling records, and the author of articles for the FBI on baseball betting, has analyzed the betting records of Rose, Janszen and Peters. In his report, Holmes describes how he verified that the betting records reflect actual Major League Baseball games played in 1987, as well as betting line information pertaining to those games.[457]

E. Other Records

We have obtained and reviewed the following telephone records for the relevant time period: Pete Rose's home phone bills;[458] Rose's car phone bills;[459] Janszen's home and car phone bills;[460] Gold's Gym phone bills;[461] the telephone logs maintained by the Cincinnati Reds of calls to and from the clubhouse (which contain notations by an operator that identify the player making or receiving the call);[462] the telephone logs of the other National League teams;[463] and the hotel bills from the Reds 1987 road trips (many of which list long distance numbers called from the player's or manager's room).[464] We have also obtained copies of various bank records of Pete Rose, including cancelled checks and statements.

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[454] Peters Interview, May 1, 1989, at 1.

[455] Peters Interview, May 1, 1989, at 1-2.

[456] Janszen Interview, April 27, 1989, at 1.

[457] *See* Exhibit 17.

[458] *See* Exhibit 53.

[459] *See* Exhibit 54.

[460] *See* Exhibit 55, 56.

[461] *See* Exhibit 22, 74.

[462] *See* Exhibit 75.

The following section summarizes the information obtained from these records, particularly the telephone traffic between the various parties. The sequence of the various telephone calls is significant because it corroborates Janszen's testimony that when he and Rose were not together at the same location, he would call Rose to obtain the names of the teams on which Rose wanted to bet, and then would call the bookmaker (Chevashore, Val, or Peters). Some of the records indicate that calls were placed to the bookmakers directly from Rose's home or hotel room.

V. SUMMARY OF BETTING ACTIVITY IN 1987

Listed below are some observations which are intended to assist the reader in comprehending and following the summary, particularly the telephone traffic, as well as explanations of certain terminology used in the summary.

1. The summary includes the games listed on Rose's betting sheets, the games listed in Janszen's notebook, and the games listed in Peters' records.

2. Peters' betting sheets record the bets as they were called in by Janszen. These bets include Pete Rose's standard bet of $2,000 on games Rose selected, some of which Janszen also bet on for himself. Janszen's standard bet was $500. On games when Rose and Janszen both bet, Peters' sheets reflect the net amount bet on each game. The following summary reflects only the $2,000 bets which were placed for Rose. It should be noted that, approximately once every two weeks, at

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[463] *See* Exhibit 76.
[464] *See* Exhibit 77.

Mike Bertolini's request, Janszen placed bets for Bertolini with Peters on some games. Therefore, a small number of bets reflected on Peters' sheets could be for Bertolini.

3. References to telephone calls placed by Paul Janszen should be understood to include the possibility that Janszen's girlfriend, Danita Marcum, placed the call. Marcum has testified that she occasionally placed calls to the bookmakers.

4. Reference in the summary to calls to Chevashore and to Val are to Tampa, Florida, and New York, New York, respectively.

5. Calls to the "sports line" provide the caller with a tape recorded message of the latest scores of sports activity. The phone records of Janszen and Rose indicate hundreds of calls to sports lines. Various sports line numbers were called. The 976-1313 number was called at numerous area codes, including 212 (Manhattan), 718 (Brooklyn), 404 (Atlanta), 312 (Chicago) and the 900 toll prefix.

6. The Reds' clubhouse telephone logs indicate incoming and outgoing telephone calls. Where the "in" box on the log is checked, that means the player was the recipient of the call, *i.e.*, the call was incoming. Where the "out" box on the log is checked, that means the player was the caller, *i.e.*, the call was outgoing. In those cases where someone called a player and he was not in or unavailable, a message was taken by the operator and given to the player. The message pads used by the Reds' operator did not have carbon copies, so there are no records of messages left for the players.[465]

7. Certain source documents supply less information about the nature of the telephone traffic. For instance, some of the Reds' hotel bills do not indicate the length of the call or the

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[465] *See* Exhibit 75.

time it was placed. Some hotel bills do not list long distance numbers called, and so were not included in the summary.

8. Janszen often travelled with Rose when the Reds were on the road.

9. Janszen and Marcum both testified that they spent considerable time at Pete Rose's home and made calls from there to bookmakers to place bets for Rose.

10. Any sports betting subsequent to June 14, 1987, could only involve baseball, as the NBA playoffs and hockey playoffs had concluded by that date.

11. It is significant that the telephone traffic and betting are at a virtual standstill from May 14 through May 16, 1987. During this period, Val refused to take any more of Rose's bets and the betting connection had not yet been reestablished with Peters.

12. A more detailed description of telephone calls is included in the separate chronology.

A. Rose Betting Chronology For the Period April 8-July 5, 1987

1. Betting with Chevashore

On April 8, 1987, the Reds played the Expos in Cincinnati at 12:35 p.m. and won 7-2. Telephone records indicate Janszen called Chevashore at 12:14 p.m. The call lasted one minute. Janszen called Chevashore at 12:18 p.m. The call lasted four minutes. Janszen called Chevashore at 6:46 p.m. The call lasted eight minutes. Janszen called Chevashore at 7:03 p.m. The call lasted seven minutes. A call was placed from Pete Rose's home to the sports line at 8:15 p.m. According to Janszen's records, Pete Rose won $2,000 on the Reds, lost $2,200 on Boston, won $2,000 on Minnesota, and won $2,000 on California.

The gambling expert has concluded that Janszen's records match the records in Pete Rose's handwriting.

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April 9, 1987 was an off day for the Reds. Telephone records indicate Janszen called Chevashore at 6:26 p.m. The call lasted eight minutes. Janszen called Chevashore at 6:40 p.m. The call lasted four minutes. Two calls were placed from Rose's home to the sports line at 10:25 p.m. and 10:45 p.m. According to Janszen's records, Pete Rose lost $2,600 on Philadelphia, won $2,000 on Baltimore, lost $3,000 on Kansas City, and lost $3,600 on California. The gambling expert has concluded that Janszen's record match the records in Pete Rose's handwriting.

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On April 10, 1987, the Reds played the Padres in Cincinnati at 7:35 p.m. and won 6-3. Telephone records indicate Janszen called the Hotel Manoir Lemoyne at 6:14 p.m., where Rene Longpre, a friend of Pete Rose, worked. The call lasted one minute. Janszen called Chevashore at 6:27 p.m. The call lasted ten minutes. Janszen called Pete Rose at the Reds' clubhouse at 6:40 p.m. Janszen called Chevashore at 6:47 p.m. The call lasted five minutes. According to Janszen's records, Pete Rose won $2,000 on the Reds, lost $2,800 on Texas, won $2,000 on Minnesota, and lost $3,200 on Philadelphia. The gambling expert has concluded that Janszen's records match the records in Pete Rose's handwriting.

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On April 11, 1987, the Reds played the Padres in Cincinnati at 2:15 p.m. and won 5-1. Telephone records indicate Janszen called Chevashore at 12:46 p.m. The call lasted seven minutes. Janszen called Chevashore at 12:55 p.m. The call lasted one minute. Janszen called Pete Rose at the Reds' clubhouse at 1:55 p.m. Janszen called Chevashore at 1:59 p.m. The call lasted two minutes. A call was placed from Pete Rose's home phone to Chevashore at 6:36 p.m. The call lasted seven minutes. A call was placed from Rose's home to the sports service at 11:09 p.m. The call lasted two minutes. According to Paul Janszen's records, Pete Rose won $2,000 on the Reds, won $2,000 on St. Louis, won $2,000 on Los Angeles, lost $3,200 on Philadelphia, won $2,000 on Milwaukee, won $2,000 on Detroit, won $2,000 on Seattle, and won $2,000 on Houston.

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On April 12, 1987, the Reds played the Padres in Cincinnati at 2:15 p.m. and lost 5-2. Telephone records indicate Janszen called Chevashore at 12:28 p.m. The call lasted six minutes. Janszen called Pete Rose at the clubhouse at 12:40 p.m. Janszen called Chevashore at 12:51 p.m. The call lasted four minutes. Janszen also called Chevashore at 1:43 p.m. The call lasted two minutes. Janszen called Chevashore at 1:46 p.m. The call lasted eight minutes. Janszen called Chevashore at 9:05 p.m. The call lasted fourteen minutes. According to Janszen's records, Rose lost $3,400 on the Reds, lost $4,800 on the Mets, won $2,000 on Philadelphia, won $2,000 on Los Angeles, lost $2,800 on Cleveland, won $2,000 on Kansas City, lost $2,600 on California, and won $2,000 on Minnesota.

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On April 13, 1987, the Reds played the Braves in Atlanta at 5:40 p.m. and won 7-2. Telephone records indicate Janszen called Chevashore at 4:01 p.m. The call lasted one minute. Janszen called Chevashore at 4:08 p.m. The call lasted one minute. Janszen called Chevashore at 5:00 p.m. The call lasted six minutes. Janszen called Chevashore at 5:14 p.m. The call lasted five minutes. Janszen called Chevashore at 6:36 p.m. The call lasted five minutes. According to Paul Janszen's records, Pete Rose won $2,000 on the Reds, lost $2,400 on San Diego, won $2,000 on Los Angeles, won $2,400 on Milwaukee, lost $2,600 on Minnesota, and lost $3,400 on Philadelphia.

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On April 14, 1987, the Reds played the Braves in Atlanta at 7:40 p.m. and won 6-3. Telephone records indicate Janszen called Chevashore at 3:26 p.m. The call lasted two minutes. Janszen called Chevashore at 5:36 p.m. The call lasted eighteen minutes. Janszen called Chevashore at 6:10 p.m. The call lasted one minute. Janszen called Chevashore at 6:17 p.m. The call lasted one minute. Janszen called Chevashore at 6:23 p.m. The call lasted five minutes. Janszen called Chevashore at 6:32 p.m. The call lasted five minutes. Janszen called the Marriott Marquis, the Reds' hotel in Atlanta, at 10:31 p.m. The call lasted six minutes. Janszen called the Marriott Marquis in Atlanta at 10:38 p.m. The call lasted one minute. Janszen called the Marriott Marquis in Atlanta at 10:49 p.m. The call lasted five minutes. Janszen called the Marriott Marquis in Atlanta at 11:50 p.m. The call lasted two minutes. According to Janszen's records, Pete Rose won $2,000 on the Reds, lost $4,000 on St. Louis, lost $2,000 on Houston, lost $2,000 on Detroit, won $2,000 on the Mets, and lost $2,800 on Oakland.

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On April 15, 1987, the Reds played the Braves in Atlanta at 7:40 p.m. and lost 4-3. Telephone records indicate Janszen called Chevashore at 3:31 p.m. The call lasted fourteen minutes. Janszen called Chevashore at 6:00 p.m. The call lasted one minute. Janszen called Chevashore at 6:21 p.m. The call lasted three minutes. Between 9:43 p.m. and 11:14 p.m., Janszen called the sports line twelve times. According to Janszen's records, Pete Rose lost $2,600 on the Reds, won $2,000 on the Yankees, won $2,000 on Milwaukee, lost $3,400 on Toronto, and won $2,000 on Houston.

2. Direct Betting With Val

April 16, 1987 was an off day for the Reds. Telephone records indicated Janszen called Pete Rose at the Reds' clubhouse at 5:50 p.m. Janszen called Chevashore at 6:13 p.m. The call lasted one minute. Janszen called Val at 6:23 p.m. The call lasted three minutes. Janszen called Pete Rose at the Reds' clubhouse at 6:40 p.m. The call lasted one and a half minutes. Janszen called Pete Rose at the Reds' clubhouse at 6:40 p.m. The call lasted one and a half minutes. Janszen called Chevashore at 6:26 p.m. The call lasted four minutes. Janszen called Pete Rose at the Reds' clubhouse at 6:45 p.m. Janszen called Chevashore at 6:56 p.m. The call lasted four minutes. Janszen called the sports line at 8:28 p.m. and 8:55 p.m. According to Janszen's records, Pete Rose won $2,000 on Seattle, lost $2,000 on Philadelphia, and won $2,000 on Toronto.

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On April 17, 1987, the Reds played the Astros in Cincinnati at 7:35 p.m. and won 9-8. Telephone records indicate Janszen called Chevashore at 5:28 p.m. The call lasted two minutes. Janszen called Chevashore at 6:15 p.m. The call lasted one minute. Janszen called Chevashore at 6:24 p.m. The call lasted one minute. Janszen called Chevashore at 6:30 p.m. The call lasted three minutes. Janszen called Pete Rose at the Reds' clubhouse at 6:40 p.m. The call lasted one and a half minutes. Janszen called Pete Rose at the Reds' clubhouse at 6:43 p.m. The call lasted three and a half minutes. Janszen called Chevashore at 6:56 p.m. The call lasted seven minutes. Janszen called Rose's home from Kentucky at 11:37 p.m. and 11:45 p.m. According to Janszen's records, Rose won $2,000 on the Reds, lost $2,000 on San Diego, won $2,600 on Atlanta, won $2,000 on Milwaukee, and lost $2,000 on Minnesota.

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On April 18, 1987, the Reds played the Astros in Cincinnati at 2:15 p.m. and won 8-0. Telephone records indicate Janszen called Val at 12:53 p.m. The call lasted five minutes. Janszen called Chevashore at 12:57 p.m. The call lasted three minutes. Janszen called Chevashore at 1:23 p.m. The call lasted seven minutes. Janszen called Pete Rose's home at 4:39 p.m.

from his car phone. The call lasted one minute. Janszen called Chevashore at 6:21 p.m. The call lasted four minutes. Janszen called Chevashore at 6:48 p.m. The call lasted eleven minutes. Janszen called Pete Rose's home at 7:41 p.m. from his car phone. The call lasted two minutes. Janszen called Pete Rose's home at 7:57 p.m. from his car phone. The call lasted one and a half minutes. Between 12:25 a.m. and 11:47 p.m., Janszen placed eight calls to the sports line. According to Janszen's records, Pete Rose won $2,000 on the Reds, lost $2,400 on San Diego, won $2,000 on St. Louis, lost $3,200 on Toronto, won $1,000 on the Yankees, won $1,000 on Detroit, and won $2,000 on Baltimore.

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On April 19, 1987, the Reds played a doubleheader against the Astros in Cincinnati, losing the first game (starting time 1:15 p.m.) 7-3 and winning the second game 6-2. Telephone records indicate Janszen called Chevashore at 11:04 a.m. The call lasted four minutes. Janszen called Chevashore at 11:36 a.m. The call lasted one minute. Janszen called Pete Rose at the Reds' clubhouse at 12:20 p.m. Between 12:46 a.m. and 1:27 a.m., Janszen placed three calls to the sports line. According to Janszen's records, Rose lost $2,000 on the Reds, lost $2,400 on Philadelphia, won $2,000 on the Yankees, lost $2,400 on the Mets, lost $3,600 on Chicago, won $2,000 on Milwaukee, and lost $3,000 on Toronto.

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On April 20, 1987, the Reds played the Padres in San Diego at 7:05 p.m. (Pacific Coast time) and won 12-3. Telephone records indicate Janszen called Chevashore at 12:13 p.m. The call lasted one minute. Janszen called Val at 12:14 p.m. The call lasted two minutes. Janszen called the Town and Country Hotel in San Diego, where the Reds and Rose stayed during this road trip, at 12:19 p.m. The call lasted two minutes. Janszen called Chevashore at 6:17 p.m. from his car phone.

The call lasted three minutes. Janszen called Chevashore at 6:40 p.m. The call lasted four minutes. Janszen called Chevashore at 6:48 p.m. The call lasted two minutes. Janszen called Val at 6:50 p.m. The call lasted four minutes. Janszen called Chevashore at 7:48 p.m. from his car phone. The call lasted one minute. Janszen called Val at 7:49 p.m. from his car phone. The call lasted one and a half minutes. Pete Rose called home twice from his hotel room in San Diego.[466] Between 8:37 p.m. and 11:30 p.m., Janszen called the sports line five times. According to Janszen's records, Pete Rose won $2,000 on the Reds, lost $2,000 on Los Angeles, won $2,000 on the Yankees, won $2,000 on Minnesota, and lost $2,000 on Chicago.

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On April 21, 1987, the Reds played the Padres in San Diego at 7:05 p.m. (Pacific Coast time) and lost 3-2. Telephone records indicate Janszen called Chevashore at 5:23 p.m. The call lasted three minutes. Janszen called Chevashore at 6:31 p.m. The call lasted five minutes. Janszen called Chevashore at 6:47 p.m. The call lasted seven minutes. Between 12:03 a.m. and 11:51 p.m., Janszen called the sports line nineteen times. According to Janszen's records, Pete Rose lost $2,600 on the Reds, won $2,000 on the Mets, lost $2,000 on Atlanta, lost $3,400 on St. Louis, lost $2,000 on Detroit, won $2,200 on Chicago, and won $2,000 on Minnesota.

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On April 22, 1987, the Reds played the Padres in San Diego at 7:05 p.m. (Pacific Coast time) and lost 6-3. Telephone records indicate Janszen called Chevashore at 6:21 p.m. The call lasted six and a half minutes. Janszen called Pete Rose's home at 6:30 p.m. from his car phone. The call lasted two minutes. Janszen called Chevashore at 6:57 p.m. The call lasted four minutes. Pete Rose called home twice from his hotel room in San Diego. Between 12:01 a.m. and 11:59 p.m., Janszen called the sports line thirteen times. According to Janszen's records, Pete Rose lost $2,600 on the Reds, lost $2,000 on Atlanta, lost $2,600 on St. Louis, and won $2,000 on Boston. Milwaukee was rained out.

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[466] Janszen and Marcum both testified that they spent a considerable amount of time at Pete Rose's home taking and placing bets.

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On April 23, 1987, the Reds played the Padres in San Diego at 1:05 p.m. (Pacific Coast time) and won 3-2. Telephone records indicate Janszen called Chevashore at 4:59 p.m. The call lasted five minutes. Janszen called Chevashore at 5:06 p.m. The call lasted four minutes. Janszen called Chevashore at 7:13 p.m. The call lasted seven minutes. Pete Rose called home from his hotel room in San Diego. Pete Rose called home from his room at the Westin Galleria in Houston, Texas.[467] Between 12:20 a.m. and 11:42 p.m., Janszen called the sports line twenty times. According to Janszen's records, no bets were paced on baseball or the Reds on this date.

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On April 24, 1987, the Reds played the Astros in Houston at 8:35 p.m. and won 4-3 in eleven innings. Telephone records indicate Janszen called Chevashore at 4:47 p.m. The call lasted fifteen minutes. Janszen called Val at 5:54 p.m. The call lasted six minutes. Janszen called Chevashore at 6:37 p.m. The call lasted seven minutes. Rose called home twice from his room at the Westin Galleria in Houston. Between 12:00 a.m. and 10:34 p.m., Janszen called the sports line ten times. According to Janszen's records, Pete Rose won $2,600 on the Reds.

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[467] The Reds played the Astros in Houston in a three-game series that began on April 24.

On April 25, 1987, the Reds played the Astros in Houston at 8:35 p.m. and won 3-0 in ten innings. Telephone records indicate Janszen called Val at 12:50 p.m. The call lasted three minutes. Janszen called Chevashore at 1:02 p.m. The call lasted one minute. Janszen called Chevashore at 1:08 p.m. The call lasted three minutes. Janszen called Chevashore at 4:26 p.m. The call lasted six minutes. Janszen called Chevashore at 5:47 p.m. The call lasted three minutes. Pete Rose called home twice and Paul Janszen twice from his room at the Westin Galleria in Houston. Between 2:39 a.m. and 11:31 p.m., Janszen called the sports line twelve times. According to Janszen's records, Pete Rose won $2,000 on Atlanta, won $2,000 on Detroit, lost $3,000 on the Yankees, and won $2,000 on Milwaukee.

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On April 26, 1987, the Reds played the Astros in Houston at 2:35 p.m. and won 11-3. Telephone records indicate Janszen called Val at 11:38 a.m. The call lasted one minute. Janszen called Chevashore at 12:23 p.m. The call lasted three minutes. Janszen called Chevashore at 12:53 p.m. The call lasted six minutes. Janszen called Chevashore at 5:47 p.m. The call lasted three minutes. A call was placed from Pete Rose's hotel room in Houston to his home. Between 2:14 p.m. and 10:51 p.m., Janszen called the sports line twenty-three times. According to Janszen's records, no bets were placed on baseball or the Reds game on that day.

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April 27, 1987 was an off day for the Reds. Telephone records indicate Janszen called Chevashore at 4:23 p.m. The call lasted two minutes. Janszen called Val at 5:16 p.m. The call lasted two minutes. A call was placed from Pete Rose's home to Chevashore at 6:37 p.m. The call lasted four minutes. A call was placed from Pete Rose's home to Chevashore at 6:44 p.m. The call lasted two minutes. A call was placed from Pete Rose's home to Chevashore at 6:53 p.m. The call lasted five minutes.

According to Janszen's records, Pete Rose won $2,000 on Seattle, lost $2,800 on California, won $2,000 on Oakland, lost $2,400 on Atlanta, lost $2,800 on the Mets, and lost $3,400 on Philadelphia.

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On April 28, 1987, the Reds played the Braves in Cincinnati at 7:35 p.m. and lost 7-3. Telephone records indicate Janszen called Chevashore at 5:59 p.m. The call lasted one minute. Janszen called Chevashore at 6:16 p.m. The call lasted five minutes. Janszen called Pete Rose at the Reds' clubhouse from his car phone at 6:43 p.m. The call lasted two minutes. Janszen called Pete Rose at the Reds' clubhouse from his car phone at 6:52 p.m. The call lasted one minute. The Reds' clubhouse records indicate that Janszen called Pete Rose twice, once at 6:45 p.m. and again at 6:55 p.m., from a number which has been determined to be Janszen's car phone. Janszen called Chevashore at 6:57 p.m. The call lasted five minutes. A call was placed from Pete Rose's home to the sports line at 8:30 p.m. The call lasted two minutes. Between 1:40 p.m. and 2:24 a.m., Janszen called the sports line six times. According to Janszen's records, Rose lost $4,000 on the Reds, lost $3,200 on Los Angeles, won $2,800 on San Diego, won $2,000 on Toronto, won $2,000 on California, lost $2,400 on Detroit, and won $2,000 on Oakland.

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On April 29, 1987, the Reds played the Braves in Cincinnati at 7:35 p.m. and lost 5-2. Telephone records indicate Janszen called Pete Rose at the Reds' clubhouse from his car phone at 6:42 p.m. The call lasted one minute. The Reds' clubhouse records indicate that Janszen called Rose at 6:45 p.m. Janszen called Val at 6:43 p.m. The call lasted four minutes. Janszen called Val at 7:08 p.m. The call lasted five minutes. Janszen called Pete Rose's home at 4:03 p.m. from his car phone. The call lasted two minutes. Three calls were placed from Pete Rose's home to the sports line at 12:17 a.m., 1:00 a.m. and 1:32 a.m. Between 1:48 a.m. and 9:57 p.m., Janszen called the sports line four times. According to Janszen's records, Rose lost $4,000 on the Reds, won $2,000 on the Mets, won $2,000 on Philadelphia, won $2,000 on St. Louis, won $2,000 on Toronto, lost $2,800 on the Yankees, lost $2,800 on Seattle, and lost $3,400 on California.

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On April 30, 1987, the Reds played the Braves in Cincinnati at 12:35 p.m. and won 9-8 in eleven innings. Telephone records indicate Janszen called Val at 11:55 a.m. The call lasted two minutes. Janszen called Val at 12:03 p.m. The call lasted one minute. Janszen called Val at 12:08 p.m. The call lasted five minutes. Janszen called Val at 6:18 p.m. The call lasted two minutes. Janszen called Val at 7:01 p.m. The call lasted three minutes. Between 2:06 a.m. and 7:07 p.m., Janszen called the sports line eight times. Janszen also called the sports line in Chicago from Philadelphia and neighboring vicinity at 9:35 p.m. and 10:59 p.m. According to Janszen's records, Rose won $2,000 on the Reds, won $2,000 on Seattle, won $2,000 on St. Louis, lost $2,200 on the Cubs, and won $2,000 on the Mets.

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On May 1, 1987, the Reds played the Phillies in Philadelphia at 7:35 p.m. and won 8-5. Telephone records indicate that Janszen called Chevashore from Philadelphia between 5:00 p.m. and 6:00 p.m. The call lasted three minutes. Janszen called Chevashore from Philadelphia between 6:00 p.m. and 7:00 p.m. The call lasted fourteen minutes. Between 7:00 p.m. and 12:00 a.m., Janszen called the sports line eight times from Philadelphia. According to Janszen's records, Rose won $2,000 on the Reds, won $2,000 on the Mets, lost $2,200 on Los Angeles, won $2,000 on Toronto, lost $2,800 on Baltimore, lost $2,400 on the Yankees and won $2,000 on Houston.

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On May 2, 1987, the Reds played the Phillies in Philadelphia at 7:05 p.m. and lost 8-3. Telephone records indicate Janszen called Chevashore from Philadelphia between 12:00 a.m. and 1:00 a.m. The call lasted four minutes. Janszen called Chevashore twice from Philadelphia between 1:00 p.m. and 2:00 p.m. The calls lasted four and six minutes. Janszen called Val from Philadelphia between 6:00 p.m. and 7:00 p.m. The call lasted two minutes. Janszen called Rose's home from Philadelphia between 6:00 p.m. and 7:00 p.m. The call lasted two minutes. Janszen called Val from Philadelphia between 7:00 p.m. and 8:00 p.m. The call lasted one minute. Between 12:00 a.m. and 11:59 p.m., Janszen called the sports line from Philadelphia eighteen times. According to Janszen's records, Rose lost $2,600 on the Reds, lost $3,000 on the Mets, won $2,000 on Toronto, lost $2,800 on Houston, won $2,000 on the Yankees, won $2,000 on Pittsburgh, lost $2,800 on St. Louis, won $2,000 on Kansas City, won $2,000 on California, and lost $2,400 on Seattle.

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On May 3, 1987, the Reds played the Phillies in Philadelphia at 1:35 p.m. and won 9-6. Telephone records indicate Janszen called Chevashore from Philadelphia between 11:00 a.m. and 12:00 noon. The call lasted seven minutes. Janszen called Chevashore from Philadelphia between 12:00 p.m. and 1:00 p.m. The call lasted four minutes. Janszen called Val twice from Philadelphia between 12:00 p.m. and 1:00 p.m. The calls lasted one and two minutes. Janszen called Val from Philadelphia between 4:00 p.m. and 5:00 p.m. The call lasted three minutes. Between 12:00 a.m. and 6:00 p.m., Janszen called the sports line eight times from Philadelphia. According to Janszen's records, Rose won $2,000 on the Reds, lost $3,200 on Houston, won $2,000 on Chicago, won $2,000 on Toronto, and won $2,000 on California. Pittsburgh and Los Angeles were rained out.

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May 4, 1987 was an off day for the Reds. Pete Rose and Paul Janszen went to New York. Telephone records indicate Janszen called Val from New York between 3:00 p.m. and 4:00 p.m. The call lasted two minutes. Janszen called Chevashore from New York between 3:00 p.m. and 4:00 p.m. The call lasted six minutes. Janszen called Chevashore from New York between 5:00 p.m. and 6:00 p.m. The call lasted fourteen minutes. Janszen called Chevashore from New York between 6:00 p.m. and 7:00 p.m. The call lasted four minutes. Janszen called Val from New York between 6:00 p.m. and 7:00 p.m. The call lasted two minutes. According to Janszen's records, Pete Rose won $2,000 on the Yankees, won $2,000 on Atlanta, lost $2,800 on St. Louis, and lost $2,800 on Los Angeles. Toronto was rained out.

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On May 5, 1987, the Reds played the Mets in New York at 7:35 p.m. and won 2-0. Telephone records indicate Janszen called Val from New York between 5:00 p.m. and 6:00 p.m. Janszen called the sports line from New York between 8:00 p.m. and 9:00 p.m. The call lasted one minute. According to Janszen's records, Rose won $2,600 on the Reds, lost $3,400 on Detroit, won $2,000 on Boston, lost $3,000 on Atlanta, and won $2,800 on Pittsburgh.

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On May 6, 1987, the Reds played the Mets in New York at 7:35 p.m. and lost 3-2. Telephone records indicate Janszen called Bertolini from New York between 10:00 a.m. and 11:00 a.m. The call lasted two minutes. Janszen called Val twice from New York between 12:00 p.m. and 1:00 p.m. The calls lasted ten and eight minutes. Janszen called Bertolini twice from New York between 12:00 p.m. and 1:00 p.m. The calls lasted four and two minutes. Janszen called Val from Queens between 5:00

p.m. and 6:00 p.m. Janszen called the sports line from New York between 9:00 p.m. and 10:00 p.m. The call lasted two minutes. According to Janszen's records, Rose lost $2,000 on the Reds, won $2,000 on Boston, lost $3,400 on Minnesota, lost $2,800 on Atlanta, won $2,000 on St. Louis, and lost $3,200 on San Francisco.

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May 7, 1987 was an off day for the Reds. Paul Janszen and Pete Rose returned to Cincinnati. The records indicate no betting action on this date. However, the telephone records indicate Janszen called Val between 12:00 a.m. and 1:00 a.m. from New York. The call lasted one minute. Janszen called Val between 1:00 a.m. and 2:00 a.m. from New York. The call lasted one minute. Janszen called Val at 12:56 p.m.[468] The call lasted four minutes. Janszen called Val at 7:06 p.m. The call lasted two minutes. Janszen called Val at 7:24 p.m. The call lasted one minute. Janszen called Val at 7:29 p.m. The call lasted one minute. Between 4:57 p.m. and 11:51 p.m., Janszen called the sports line eight times.

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On May 8, 1987, the Reds played the Phillies in Cincinnati at 7:35 p.m. and won 4-3. Telephone records indicate Janszen called Val at 6:36 p.m. The call lasted two minutes. Janszen called Pete Rose at the clubhouse at 6:40 p.m. Between 12:19 a.m. and 11:49 p.m., Janszen called the sports line fourteen times, three times from Pete Rose's home. A call was placed from Rose's home to the sports line at 11:55 p.m. The call lasted one minute. According to Janszen's records, Rose won $2,000 on the Reds, won $2,000 on Houston, won $2,000 on Atlanta, won $2,000 on Chicago, lost $2,800 on California, lost $2,800 on Detroit, and lost $3,200 on Milwaukee.

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[468] The remainder of the calls for May 7 were placed from Janszen's home in Cincinnati.

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On May 9, 1987, the Reds played the Phillies in Cincinnati at 2:15 p.m. and lost 4-2. Telephone records indicate Janszen called Pete Rose at the clubhouse at 1:30 p.m. Between 12:30 a.m. and 11:33 p.m., Janszen called the sports line thirty-two times. Between 12:30 a.m. and 11:57 p.m., five calls were placed from Pete Rose's home to the sports line. According to Janszen's records, Rose lost $3,400 on the Reds, lost $2,800 on Houston, won $2,200 on Atlanta, lost $3,000 on Boston, lost $2,800 on Milwaukee, won $2,000 on Los Angeles, lost $2,000 on San Diego, lost $2,800 on Detroit, lost $2,600 on the White Sox, and lost $4,000 on the Yankees.

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On May 10, 1987, the Reds played the Phillies in Cincinnati at 2:15 p.m. and lost 4-3. Fifteen calls were placed from Pete Rose's home to the sports line between 12:23 a.m. and 8:33 p.m. Between 12:28 a.m. and 6:15 p.m., Janszen called the sports line fifteen times. According to Janszen's records, Rose lost $3,400 on the Reds, lost $3,200 on Milwaukee, lost $2,800 on Houston, lost $2,800 on the Mets, won $2,400 on San Diego, won $2,000 on Los Angeles, won $2,000 on Boston, won $2,000 on the Yankees, and won $2,000 on Detroit.

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On May 11, 1987, the Reds played the Mets in Cincinnati at 7:35 p.m. and won 12-2. Telephone records indicate Janszen called Val at 6:34 p.m. The call lasted three minutes. Between 7:50 p.m. and 11:15 p.m., Janszen called the sports line seventeen times. According to Janszen's records, Rose won $2,000 on the Reds, won $2,000 on the Yankees, won $2,000 on Toronto, lost $4,000 on Boston, lost $2,000 on Atlanta, lost $3,600 on Houston, lost $3,400 on Los Angeles, and lost $2,000 on Detroit.

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On May 12, 1987, the Reds played the Mets in Cincinnati at 7:35 p.m. and lost 6-2. Telephone records indicate Janszen called Pete Rose at the clubhouse at 9:55 p.m. Between 12:40 a.m. and 11:51 p.m., Janszen called the sports line fifteen times. According to Janszen's records, Pete Rose lost $2,800 on the Reds, won $2,000 on Atlanta, won $2,000 on Los Angeles, and won $2,000 on Detroit. This was the last date showing baseball betting in Janszen's records.

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On May 13, 1987, the Reds played the Expos in Montreal at 7:05 p.m. and won 12-6. Telephone records indicate Janszen called Val at 6:58 p.m. The call lasted three minutes. Between 12:38 a.m. and 10:46 p.m., Janszen called the sports line sixteen times.

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On May 14, 1987, the Reds played the Expos in Montreal at 7:35 p.m. and won 10-9. Telephone records indicate a call was placed at 12:13 p.m. from Pete Rose's home to Rene Longpre/Hotel Manoir Lemoyne. The call lasted five minutes. Another call was placed from Pete Rose's home to Le Centre Station, the Reds' hotel in Montreal, at 12:18 p.m. The call lasted one minute. Janszen called Val from his car phone at 1:28 p.m. The call lasted one minute. Janszen called Rene Longpre/Hotel Manoir Lemoyne in Montreal at 7:32 p.m. from his car phone. The call lasted one minute. Between 10:31 p.m. and 11:03 p.m., Janszen called the sports line four times.

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On May 15, 1987, the Reds played the Cardinals in St. Louis at 8:35 p.m. and lost 5-4.

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On May 16, 1987, the Reds played the Cardinals in St. Louis at 8:05 p.m. and lost 6-5.

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3. Betting with Peters

On May 17, 1987, the Reds played the Cardinals in St. Louis at 2:15 p.m. and lost 10-2. Janszen was in St. Louis. The phone traffic with Ron Peters began on this day. Telephone records indicate Janszen called Peters from St. Louis at 10:38 a.m. The call lasted two minutes. Janszen called Peters from St. Louis at 10:54 a.m. The call lasted one minute. Janszen called Pete Rose's home from St. Louis at 11:40 a.m. The call lasted two minutes. Two calls were placed from Pete Rose's home phone to the Marriott Pavilion, the Reds' hotel in St. Louis, at 12:07 a.m. and 12:14 a.m. The calls lasted two and eight minutes. Janszen called Pete Rose's home from St. Louis at 12:17 a.m. The call lasted seven minutes. After the game, Pete Rose and Janszen travelled to Chicago for the Reds' series against the Cubs. A call was placed from Pete Rose's hotel room in Chicago to Janszen's home.

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May 18, 1987 was an off day for the Reds. Telephone records indicate Janszen called Ron Peters from the Westin Hotel in Chicago at 11:27 a.m. The call lasted one minute. Janszen called Peters from the Westin Hotel at 6:08 p.m. The call lasted seven minutes. A call was placed from Pete Rose's room at the Westin Hotel in Chicago to Peters. A call was placed from Pete Rose's room at the Westin Hotel in Chicago to Janszen.

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On May 19, 1987, the Reds played the Cubs in Chicago at 2:20 p.m. and lost 9-2. Telephone records indicate Janszen called Peters from the Westin Hotel in Chicago at 5:54 p.m. The call lasted two minutes. Janszen called Peters from the Westin Hotel in Chicago at 6:03 p.m. The call lasted six minutes. Janszen called Peters from Chicago at 6:16 p.m. The call lasted one minute. Two calls were placed from Pete Rose's room at the Westin Hotel in Chicago to Peters. Three calls were placed from Pete Rose's room at the Westin Hotel in Chicago to Janszen's home. Fourteen calls were placed from Pete Rose's hotel room in Chicago to the sports line.

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On May 20, 1987, the Reds played the Cubs in Chicago at 2:20 p.m. and won 6-2. Telephone records indicate Janszen called Peters from the Westin Hotel in Chicago at 5:40 p.m. The call lasted one minute. Janszen called Peters from the Westin Hotel in Chicago at 6:58 p.m. The call lasted one minute. Janszen called Val from the Westin Hotel in Chicago at 9:34 p.m. The call lasted one minute. A call was placed from Pete Rose's room at the Westin Hotel in Chicago to Val. A call was placed from Pete Rose's room at the Westin Hotel in Chicago to Janszen's home. Three calls were placed from Pete Rose's hotel room in Chicago to the sports line.

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On May 21, 1987, the Reds played the Cubs in Chicago at 4:05 p.m. and lost 8-7. Telephone records indicate Janszen called Gold's Gym from the Westin Hotel in Chicago at 10:39 a.m. The call lasted one minute. Janszen called Val from the Westin Hotel in Chicago at 10:42 p.m. The call lasted one minute. Janszen called Gold's Gym from the Westin Hotel in Chicago at 11:49 a.m. The call lasted one minute. A call was placed from Pete Rose's room at the Westin Hotel in Chicago to Val. A call was placed from Pete Rose's room at the Westin Hotel in Chicago to Janszen's home. Janszen called the sports line at 7:49 p.m. and 9:03 p.m.

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On May 22, 1987, the Reds played the Pirates in Cincinnati at 7:35 p.m. and lost 4-1. Telephone records indicate Janszen called Peters at 5:41 p.m. and 6:35 p.m. The calls lasted two minutes and one minute. Janszen called the sports line at 9:56 p.m. The call lasted one minute.

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On May 23, 1987, the Reds played the Pirates in Cincinnati at 7:05 p.m. and lost 3-2. Telephone records indicate Janszen called Peters at 1:26 p.m. The call lasted one minute. Janszen called Peters at 1:41 p.m. The call lasted one minute. Janszen called Peters at 5:14 p.m. from his car phone. The call lasted a minute and a half. Janszen called Peters at 6:07 p.m. from his car phone. The call lasted a minute and a half. Janszen called the sports line at 9:50 p.m.

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On May 24, 1987, the Reds played the Pirates in Cincinnati at 2:15 p.m. and lost 7-2. Telephone records indicate Janszen called Peters at 12:52 a.m. from his car phone. Janszen called Peters at 6:31 p.m. from Pete Rose's home. The call lasted two minutes. A call was placed from Pete Rose's home to Peters at 7:31 p.m. The call lasted one minute. Another call was placed from Pete Rose's home to Peters at 7:44 p.m. The call lasted one minute. Four calls were placed from Pete Rose's home to the sports line between 2:51 p.m. and 3:55 p.m.

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On May 25, 1987, the Reds played the Cubs in Cincinnati at 2:15 p.m. and won 5-4. Telephone records indicate Janszen called Peters from his car phone at 12:34 p.m. The call lasted one and a half minutes. Janszen called Pete Rose at the clubhouse at 1:05 p.m. Janszen called Pete Rose at the Reds' clubhouse at 1:16 p.m. from Franklin, Ohio. The call lasted one minute. Mike Bertolini called Pete Rose at the Reds' clubhouse at 1:50 p.m. Janszen called Pete Rose at the Reds' clubhouse at 2:00 p.m. from his car phone. The call lasted one and a half minutes. Janszen called Peters from his car phone at 2:21 p.m. The call lasted one minute. Janszen called Peters at 4:06 p.m. The call lasted one minute. Janszen called Peters from his car phone at 5:32 p.m. The call lasted two minutes. Janszen called Pete Rose at the Reds' clubhouse at 5:35 p.m. from his car phone. The call lasted one minute. Janszen called Pete Rose's home at 5:38 p.m. from his car phone. The call lasted one minute. Janszen called Peters from his car phone at 5:48 p.m. The call lasted two and a half minutes. Janszen called Pete Rose's home at 6:42 p.m. from his car phone. The call lasted one minute. Janszen called Chevashore at 9:22 p.m. The call lasted three minutes. Janszen called the sports line at 9:53 p.m. from Pete Rose's home. The call lasted one minute. Janszen called the sports line three times from his car phone between 2:32 p.m. and 5:52 p.m. Three calls were placed from Pete Rose's home to the sports line between 8:33 p.m. and 11:10 p.m.

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On May 26, 1987, the Reds played the Cubs in Cincinnati at 7:35 p.m. and won 3-2. Telephone records indicate Janszen called Pete Rose at the Reds' clubhouse at 7:15 p.m. Between 12:41 a.m. and 11:44 p.m., Janszen called the sports line ten times. No calls to Peters on May 26, 1987 could be located from available records.

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On May 27, 1987, the Reds played the Cubs in Cincinnati at 7:35 p.m. and lost 4-1. Telephone records indicate Janszen called Pete Rose at the Reds' clubhouse at 6:50 p.m. Between 12:18 a.m. and 11:42 p.m., Janszen called the sports line twenty-two times. A call was placed from Pete Rose's home to the sports line at 12:30 a.m. No calls to Peters on May 27, 1987 could be located from available records. According to Peters' records, Rose bet $2,000 each on the Reds, Toronto, Detroit, the Yankees, Los Angeles, San Diego, Houston and Minnesota. He won five and lost three bets.

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May 28, 1987 was an off day for the Reds. Telephone records indicate a call was placed from Pete Rose's room at the Westin Hotel in Pittsburgh to Janszen at 10:24 p.m. A call was placed from Pete Rose's home to the Westin Hotel in Pittsburgh at 11:25 p.m. The call lasted six minutes. Between 12:22 a.m. and 11:30 p.m., Janszen called the sports line twenty-one times. A call was placed from Pete Rose's home to the sports line at 12:49 a.m. There were no calls to Peters on May 28, 1987. According to Peters' records, Rose did not bet on this day.

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On May 29, 1987, the Reds played the Pirates in Pittsburgh at 7:05 p.m. and won 13-6. Telephone records indicate two calls were placed from Pete Rose's room at the Westin Hotel in Pittsburgh to Janszen at 11:55 p.m. and 12:32 a.m. (the morning of May 30). Three calls were placed at 12:46 p.m., 1:00 p.m., and 11:43 p.m. from Pete Rose's room in Pittsburgh to Pete Rose's home. A call was placed from Pete Rose's home to the Westin Hotel in Pittsburgh at 12:24 p.m. The call lasted one minute. Janszen called Peters from his car phone at 5:55 p.m. The call lasted one minute and a half. Janszen called Peters at 6:46 p.m. The call lasted one minute. Between 6:51 p.m. and 11:46 p.m., Janszen called the sports line twenty-three times.

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On May 30, 1987, the Reds played the Pirates in Pittsburgh at 7:05 p.m. and won 6-2. It is apparent from the phone records that Janszen travelled to Pittsburgh on that day. Telephone records indicate three calls were made from Pete Rose's hotel room at the Westin in Pittsburgh to Ron Peters at 1:02 p.m., 1:03 p.m. and 3:24 p.m. Two calls were placed at 1:06 p.m. and 1:42 p.m. from Pete Rose's hotel room to a golf course in Franklin, Ohio, that Peters was known to frequent. Janszen called Peters from the Westin in Pittsburgh at 12:47 p.m. The call lasted two minutes. Janszen called the golf course Peters was known to frequent from the Westin Hotel in Pittsburgh at 12:49 p.m. The call lasted one minute. A call was made from Janszen's car phone to the Westin Hotel in Pittsburgh at 1:07 p.m. The call lasted five minutes. A call was placed from Rose's home to the Westin Hotel in Pittsburgh at 1:08 p.m. The call lasted two minutes. A call was placed from Pete Rose's room to Mike Bertolini in New York at 2:34 p.m. Janszen called Ron Peters from Pittsburgh at 3:24 p.m. The call lasted one minute. Janszen called Peters from Pittsburgh at 4:01 p.m. The call lasted one minute. Janszen called Peters from Pittsburgh at 9:37 p.m. The call lasted one minute. Janszen called his home from the Westin Hotel at 10:37 p.m. The call lasted one minute. A call was placed from Pete Rose's room at the Westin Hotel to Janszen's car phone at 10:45 p.m. A call was placed from Pete Rose's room at the Westin Hotel to his home at 10:51 p.m. Two calls were placed from Pete Rose's room at the Westin Hotel to Janszen's home at 11:09 p.m. and 12:25 a.m. (the morning of May 31). Between 3:24 p.m. and 9:48 p.m., Janszen called the sports line sixteen times. Nine calls were placed from Pete Rose's hotel room in Pittsburgh to the sports line.

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On May 31, 1987, the Reds played the Pirates in Pittsburgh at 1:35 p.m. and won 5-2. Telephone records indicate a call was placed from Janszen's home to the Westin Hotel in Pittsburgh at 9:51 a.m. The call lasted one minute. Janszen called Peters from Pittsburgh at 10:19 a.m. The call lasted one minute. Janszen called Peters from Pittsburgh at 11:26 a.m.

The call lasted one minute. Janszen called Peters from Pittsburgh at 12:03 p.m. The call lasted one minute. Janszen called Peters from Pittsburgh at 12:12 p.m. The call lasted three minutes. Between 3:57 p.m. and 4:46 p.m., Janszen called the sports line five times from Pittsburgh. Between 6:48 p.m. and 10:15 p.m., four calls were placed from Janszen's home to the sports line. A call was placed from Pete Rose's home at 8:50 p.m. to the sports line.

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On June 1, 1987, the Reds played the Cardinals in Cincinnati at 7:35 p.m. and lost 8-6 in ten innings. Telephone records indicate Janszen called Pete Rose's home at 12:31 p.m. from his car phone. The call lasted one minute. Janszen called Pete Rose's home at 1:29 p.m. from his car phone. The call lasted two minutes. Janszen called Peters from his car phone at 5:57 p.m. The call lasted one minute. Janszen called Pete Rose's home at 5:58 p.m. from his car phone. The call lasted two minutes. Janszen called Peters from his car phone at 6:36 p.m. The call lasted four minutes. Janszen called Pete Rose at the Reds' clubhouse at 6:45 p.m. Janszen called Rose's home at 8:44 p.m. from his car phone. The call lasted one and a half minutes. Janszen called the sports line at 8:28 p.m. The call lasted one minute. Between 8:42 p.m. and 11:30 p.m., Janszen called the sports line five times from his car phone. According to Peters' records, Rose bet $2,000 each on the Reds, Cleveland, Toronto, the Yankees, Kansas City, the Dodgers and Philadelphia. He won one and lost six bets.

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On June 2, 1987, the Reds played the Cardinals in Cincinnati at 7:35 p.m. and won 3-2. Telephone records indicate a call was placed from Pete Rose's home to Peters at 2:18 p.m. The call lasted two minutes. Janszen called Pete Rose's home at 4:50 p.m. from his car phone. The call lasted one minute. Janszen called Peters at 7:27 p.m. The call lasted one minute.

A call was placed from Pete Rose's home to the sports line at 11:30 p.m. The call lasted one minute. Between 8:14 p.m. and 10:42 p.m., Janszen called the sports line thirteen times. Janszen called the sports line at 10:58 p.m. from his car phone. According to Peters' records, Rose bet $2,000 each on the Reds, San Diego, Pittsburgh, Los Angeles, the Yankees, Boston, Cleveland and Toronto. He won five and lost three bets.

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On June 3, 1987, the Reds played the Cardinals in Cincinnati at 7:35 p.m. and won 6-4. Telephone records indicate Janszen called Peters from his car phone at 12:43 p.m. The call lasted one minute. Janszen called Pete Rose's home at 12:41 from his car phone. The call lasted two and a half minutes. Janszen called Pete Rose at the Reds' clubhouse at 3:56 p.m. from his car phone. The call lasted three and a half minutes. Janszen called Pete Rose at the Reds' clubhouse at 4:05 p.m. from his car phone. The call lasted one minute. Janszen called Peters from his car phone at 4:18 p.m. The call lasted one minute. Janszen called Pete Rose's home at 4:21 p.m. from his car phone. The call lasted one minute. Janszen called Pete Rose at the Reds' clubhouse at 4:26 p.m. from his car phone. The call lasted four and a half minutes. Between 12:01 a.m. and 1:09 a.m., five calls were placed from Pete Rose's home to the sports line. Between 8:50 p.m. and 10:20 p.m., Janszen called the sports line four times. Between 1:43 a.m. and 10:51 p.m., nine additional calls were placed from Janszen's car phone to the sports line. According to Peters' records, Rose bet $2,000 each on the Reds, Atlanta, Los Angeles, Oakland, the Yankees and Cleveland; he bet $1,000 on Montreal. He won five and lost two bets.

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June 4, 1987 was an off day for the Reds. Telephone records indicate Janszen called Pete Rose's home at 12:06 p.m. from his car phone. The call lasted two and a half minutes.

Janszen called Ron Peters at 12:09 p.m. from his car phone. The call lasted one and a half minutes. Janszen called Pete Rose's home at 12:35 p.m. from his car phone. The call lasted one and a half minutes. Janszen called Pete Rose at the Reds' clubhouse at 12:47 p.m. from his car phone. The call lasted one minute. Janszen called Pete Rose's home at 2:44 p.m. from his car phone. The call lasted one minute. Janszen called Pete Rose's home at 2:45 p.m. from his car phone. The call lasted four minutes. Janszen called Pete Rose's home at 3:46 p.m. from his car phone. The call lasted two minutes. Two calls were placed from Pete Rose's home to Peters at 6:34 p.m. and at 6:40 p.m. The calls lasted three minutes and one minute. Two more calls were placed from Pete Rose's home to Peters at 8:12 p.m. and 8:13 p.m. Each call lasted one minute. Five calls were placed from Pete Rose's home to the sports line between 7:40 p.m. and 11:49 p.m. Janszen called the sports line at 1:04 a.m. and 9:33 p.m. Janszen called the sports line from his car at 4:31 p.m.

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On June 5, 1987, the Reds played the Dodgers in Cincinnati at 7:35 p.m. and won 8-6. Pete Rose reserved two complimentary tickets for "Peters." Telephone records indicate Janszen called Peters from his car phone at 11:36 a.m. The call lasted one and a half minutes. Janszen called Rose's home twice at 12:08 p.m. from his car phone. The calls lasted one minute and one and a half minutes. Janszen called Pete Rose at the Reds' clubhouse at 12:56 p.m. from his car phone. The call lasted two minutes. A call was placed from Pete Rose's home to Peters at 3:40 p.m. The call lasted one minute. A call was placed from Pete Rose's home to Peters at 7:17 p.m. The call lasted three minutes. Two calls were placed from Pete Rose's home to the sports line at 12:16 a.m. and 11:28 p.m. Between 12:59 a.m. and 10:54 p.m., Janszen called the sports line twelve times. According to Peters' records, Rose bet $2,000 each on Detroit, Minnesota, the Yankees, Seattle and Oakland. He won three and lost two bets.

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On June 6, 1987, the Reds played the Dodgers in Cincinnati at 7:05 p.m. and won 5-2. Pete Rose reserved four complimentary tickets for Mike Bertolini. Telephone records indicate a call was placed from Pete Rose's home to Peters at 11:59 a.m. The call lasted one minute. A call was placed from Pete Rose's home to Peters at 1:07 p.m. The call lasted one minute. A call was placed from Pete Rose's home to Peters at 1:30 p.m. The call lasted one minute. A call was placed from Pete Rose's home to Peters at 1:37 p.m. The call lasted one minute. Danita Marcum called Pete Rose at the clubhouse at 2:05 p.m. (The Reds' clubhouse telephone log reflects the call as being made by Danita Gray, Marcum's maiden name.) A call was placed from Pete Rose's home to Peters at 2:13 p.m. The call lasted two minutes. Ten calls were placed from Pete Rose's home to the sports line between 9:31 p.m. and 11:57 p.m. Between 12:13 a.m. and 8:14 p.m., Janszen called the sports line eight times. According to Peters' records, Rose bet $2,000 each on the Reds, Houston, the Mets, the Cubs and San Diego. He won four and lost one bet.

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On June 7, 1987, the Reds played the Dodgers in Cincinnati at 2:15 p.m. and lost 13-7. Telephone records indicate Marcum (Gray) called Pete Rose at the Reds' clubhouse at 12:05 p.m. Eight calls were placed from Pete Rose's home to the sports line between 12:04 a.m. and 12:13 a.m. Between 1:18 a.m. and 6:44 p.m., Janszen called the sports line eleven times. Between 3:28 p.m. and 4:50 p.m., Janszen called the sports line nine additional times from his car phone. According to Peters' records, Rose bet $2,000 each on the Reds, Pittsburgh and Montreal. He lost all three bets.

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On June 8, 1987, the Reds played the Giants in Cincinnati at 7:35 p.m. and won 7-6. Pete Rose reserved two complimentary tickets for Mike Bertolini. Telephone records indicate Janszen called Pete Rose at the Reds' clubhouse at 12:13 p.m. The call lasted one and a half minutes. A call was placed from Pete Rose's home to Rene Longpre/Hotel Manoir Lemoyne at 1:11 p.m. The call lasted eleven minutes. Janszen called Peters at 2:10 p.m. The call lasted one minute. Janszen called Pete Rose's home at 2:36 p.m. from his car phone. The call lasted one minute. Janszen called Peters at 3:21 p.m. The call lasted one minute. Janszen called Pete Rose at the Reds' clubhouse at 4:12 p.m. from his car phone. The call lasted one minute. Janszen called Pete Rose at the Reds' clubhouse at 4:14 p.m. from his car phone. The call lasted one and a half minutes. The Reds' clubhouse phone records indicate a call from Janszen to Pete Rose at 4:15 p.m. Janszen called Pete Rose at the Reds' clubhouse at 7:28 p.m. from his car phone. The call lasted one and a half minutes. The Reds' clubhouse phone records indicate Janszen called Pete Rose at 7:30 p.m. Janszen called Pete Rose's home at 11:17 p.m. from his car phone. The call lasted three and a half minutes. Janszen called Pete Rose's home at 11:49 p.m. from his car phone. The call lasted two minutes. Between 8:09 p.m. and 9:41 p.m., Janszen called the sports line four times. Between 4:24 p.m. and 11:38 p.m., Janszen made eight additional calls to the sports line from his car phone. According to Peters' records, Rose bet $2,000 each on the Reds, the Cubs, St. Louis, Toronto, Minnesota, Seattle and the White Sox. He won six and lost one bet.

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On June 9, 1987, the Reds played the Giants in Cincinnati at 7:35 p.m. and lost 10-2. Telephone records indicate Janszen called Pete Rose's home at 1:52 p.m. from his car phone. The call lasted one minute. A call was placed from Pete Rose's home to Peters at 2:49 p.m. The call lasted one minute. Janszen called Pete Rose's home at 6:34 p.m. from his car phone. The call lasted two minutes. Janszen called Peters from his car phone at 6:41 p.m. The call lasted one minute. Marcum called Pete Rose at the clubhouse at 7:00 p.m. Four calls were placed from Pete Rose's home to the sports line between 12:12 a.m. and 11:45 p.m. Janszen called the sports line at 12:57 a.m., 7:40 p.m. and 11:39 p.m. According to Peters' records, Rose bet $2,000 each on the Reds, the Phillies, Houston, California, Toronto, Minnesota, Oakland, Montreal, Atlanta and Seattle. He won six and lost four bets.

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On June 10, 1987, the Reds played the Giants in Cincinnati at 12:35 p.m. and lost 9-4. Telephone records indicate Janszen called Peters at 5:06 p.m. The call lasted one minute. Janszen called Pete Rose's home from his car phone at 6:27 p.m., 8:22 p.m., and 9:00 p.m. The calls lasted one minute, one and a half minutes, and two and a half minutes. Four calls were placed from Pete Rose's home to the sports line at 12:22 a.m., 10:31 p.m., 10:41 p.m. and 10:54 p.m. Between 7:43 p.m. and 11:39 p.m., Janszen called the sports line eleven times. According to Peters' records, Rose bet $2,000 each on Atlanta, Montreal, St. Louis, California, Toronto, Houston, Detroit, Baltimore, Kansas City and Seattle. He won five and lost five bets.

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On June 11, 1987, the Reds played the Braves in Cincinnati at 7:35 p.m. and lost 6-4. Telephone records indicate Janszen called Pete Rose's home from his car phone at 12:18 p.m. The call lasted one minute. Janszen called Peters from his car phone at 12:37 p.m. The call lasted one minute. Janszen called Peters from his car phone at 12:37 p.m. The call lasted one minute. Janszen called Peters from his car phone at 12:58 p.m. The call lasted three minutes. Pete Rose called home from his car phone at 1:30 p.m. The call lasted two and a half minutes. Janszen called Pete Rose at the Reds' clubhouse at 5:52 p.m. from his car phone. The call lasted two and a half minutes. Janszen called Peters from his car phone at 6:02 p.m. The call lasted three and a half minutes. Janszen called Pete Rose's home at 6:07 p.m. from his car phone. The call lasted two minutes. Janszen called Pete Rose at the Reds' clubhouse at 6:09 p.m. from his car phone. The call lasted two minutes. Janszen called Peters from his car phone at 6:11 p.m. The call lasted one minute. Janszen called Pete Rose at the Reds' clubhouse at 6:20 p.m. from his car phone. The call lasted three and a half minutes. Pete Rose called home from his car phone at 7:09 p.m. The call lasted three and a half minutes. Janszen called Pete Rose's home from his car phone at 8:50 p.m. and 8:55 p.m. The calls lasted three minutes and one and a half minutes. Two calls were placed from Rose's home to the sports line at 1:06 a.m. and 11:28 p.m. Between 12:22 a.m. and 11:25 p.m., Janszen called the sports line twelve times. According to Peters' records, Rose bet $2,000 each on the Reds, the Dodgers, San Diego and Toronto. He lost three and won one bet.

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On June 12, 1987, the Reds played the Braves in Cincinnati at 7:35 p.m. and lost 4-3. Telephone records indicate Janszen called Pete Rose at the Reds' clubhouse at 5:10 p.m. Janszen called Pete Rose at the Reds' clubhouse at 5:45 p.m. Pete Rose called his home from a mobile phone at 6:21 p.m. The call lasted one minute. A call was placed from Pete Rose's home to Peters at 7:19 p.m. The call lasted two minutes. A call was placed from Pete Rose's home to Peters at 7:25 p.m. The call lasted one minute A call was placed from Pete Rose's home to Peters at 7:29 p.m. The call lasted three minutes. Between 12:20 a.m. and 11:39 p.m., Janszen called the sports line eighteen times. According to Peters' records, Rose bet $2,000 each on the Reds, Los Angeles, Minnesota, Toronto, Oakland, the Cubs, San Diego, Pittsburgh and Seattle. He won four and lost five bets.

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On June 13, 1987, the Reds played the Braves in Cincinnati at 7:05 p.m. and won 5-2. Telephone records indicate Janszen called Pete Rose's home at 1:49 p.m. from his car phone. The call lasted four minutes. Janszen called Peters from his car phone at 1:53 p.m. The call lasted one and a half minutes. Janszen called from his car phone at 1:55 p.m. to a golf course frequented by Peters in Franklin, Ohio. The call lasted one minute. Janszen called Peters at 1:56 p.m. from his car phone. The call lasted one minute. Janszen called Peters at 2:12 p.m. The call lasted one minute. Janszen called Pete Rose's home at 2:00 p.m. from his car phone. The call lasted two and a half minutes. Janszen called Peters from his car phone at 5:56 p.m. The call lasted four and a half minutes. Four calls were placed from Pete Rose's home to the sports line at 12:03 a.m., 12:29 a.m., 1:04 a.m. and 10:37 p.m. Between 12:03 a.m. and 11:59 p.m., Janszen called the sports line eighteen times. Between 7:54 p.m. and 9:39 p.m., Janszen called the sports line seven additional times from his car phone. According to Peters' records, Rose bet $2,000 each on the Reds, Los Angeles, the Yankees, Pittsburgh, Toronto, Oakland, California and Seattle. He won seven bets and lost one bet.

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On June 14, 1987, the Reds played the Braves in Cincinnati at 2:15 p.m. and won 4-3. Telephone records indicate Marcum called Rose at the Reds' clubhouse at 12:15 p.m. from Rose's home. Janszen called Pete Rose at the Reds' clubhouse at 12:46 p.m. from his car phone. The call lasted four minutes. Janszen called Pete Rose's home from his car phone at 3:36 p.m. and 5:18 p.m. The calls lasted one minute and a half and one minute. Pete Rose called the sports line twice from his car phone at 7:17 p.m. and 7:25 p.m. A call was placed from Pete Rose's home to the sports line at 8:16 p.m. Between 12:28 a.m. and 9:23 p.m., Janszen called the sports line seven times. According to Peters' records, Rose bet $2,000 each on the Reds, Texas, Seattle, Pittsburgh, Los Angeles and Toronto. He won three and lost three bets. Rose also bet $2,000 on the Celtics and lost.

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On June 15, 1987, the Reds played the Astros in Houston at 8:35 p.m. and lost 4-0. Telephone records indicate a call was placed from Pete Rose's room at the Westin Hotel in Houston to his home. A call was placed from Pete Rose's hotel room to Janszen's home. A call was placed from Pete Rose's home to Peters at 3:09 p.m. The call lasted one minute. A call was placed from Pete Rose's home to the Westin Hotel in Houston at 4:03 p.m. The call lasted one minute. Four calls were placed from Pete Rose's home to Peters at 4:15 p.m., 6:06 p.m., 6:33 p.m. and 7:08 p.m. The calls lasted two minutes, three minutes, one minute and one minute. A call was placed from Pete Rose's home to the Westin Hotel in Houston at 7:21 p.m. The call lasted two minutes. A call was placed from Pete Rose's home to the sports line at 6:05 p.m. The call lasted one minute. Between 8:25 p.m. and 11:59 p.m., Janszen called the sports line nine times. According to Peters' records, Rose did not bet on this day.

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On June 16, 1987, the Reds played the Astros in Houston at 8:35 p.m. and lost 4-1. Telephone records indicate Janszen called Pete Rose from Pete Rose's home through the Astros' switchboard at 4:30 p.m. Janszen called the Houston Astrodome from his car phone at 5:12 p.m. The call lasted one minute. Janszen called the Houston Astrodome from his car phone at 5:28 p.m. The call lasted two minutes. Janszen called Peters at 5:43 p.m. from his car phone. The call lasted two minutes. A call was placed from Pete Rose's home to the Reds' hotel in Houston at 5:57 p.m. The call lasted one minute. Janszen called the Houston Astrodome from his car phone at 6:31 p.m. The call lasted two minutes. Janszen called Peters from his car phone at 6:39 p.m. The call lasted five and a half minutes. A call was placed from Pete Rose's home to the Reds' hotel in Houston at 6:54 p.m. The call lasted two minutes. Two calls were placed from Pete Rose's hotel room at the Westin to his home, and one call was placed to Janszen's home. A call was placed from Pete Rose's home to the sports line at 4:30 p.m. The call lasted one minute. Between 8:19 p.m. and 11:35 p.m., Janszen called the sports line fifteen times. According to Peters' records, Rose bet $2,000 each on the Reds, the Cubs, San Diego, the Mets, Atlanta, California, the Yankees and Milwaukee. He won five and lost three bets.

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On June 17, 1987, the Reds played the Astros in Houston at 8:35 p.m. and won 9-1. Telephone records indicate Pete Rose called home from his hotel room in Houston three times. A call was placed from Pete Rose's home to Peters at 1:50 p.m. The call lasted four minutes. A call was placed from Pete Rose's home to the Westin Hotel in Houston at 4:07 p.m. The call lasted three minutes. A call was placed from Pete Rose's home to Peters at 4:26 p.m. The calls lasted one minute. Two calls were placed from Pete Rose's home to the Houston Astrodome at 6:41 p.m. and 6:43 p.m. The calls lasted one minute and three minutes. A call was placed from Pete Rose's home to Peters at 6:53 p.m. The call lasted five minutes. Between 3:44 p.m. and 10:23 p.m., seventeen calls were placed to the sports line from Pete Rose's home and mobile phone. Between 12:05 a.m. and 9:25 a.m., Janszen called the sports line three times. According to Peters' records, Rose bet $2,000 each on the Reds, the Phillies, San Francisco, the Mets, Baltimore, Boston and California. He won three and lost four bets.

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On June 18, 1987, the Reds played the Braves in Atlanta at 7:40 p.m. and won 8-4. Telephone records indicate a call was placed from Pete Rose's home to Peters at 4:11 p.m. The call lasted two minutes. A call was placed from Pete Rose's home to

Peters at 6:04 p.m. The call lasted one minute. A call was placed from Pete Rose's home to the Brave's Ticket Office in Atlanta at 6:15 p.m. The call lasted one minute. Two calls were placed from Pete Rose's home to Atlanta/Fulton County Stadium at 6:16 p.m. and 6:49 p.m. Each call lasted two minutes. A call was placed from Pete Rose's home to Peters at 7:08 p.m. The call lasted two minutes. Three calls were placed from Pete Rose's home to Peters at 10:11 p.m., 11:24 p.m. and 11:25 p.m. The calls lasted one minute, one minute and two minutes. Twenty-two calls were placed from Pete Rose's home to the sports line between 8:52 a.m. and 11:55 p.m. Janszen called the sports line at 7:36 p.m. and 8:22 p.m. According to Peters' records, Rose bet $2,000 on the Reds and won.

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On June 19, 1987, the Reds played the Braves in Atlanta at 7:40 p.m. and lost 16-5. Telephone records indicate Janszen called Peters from his car phone at 3:46 p.m. The call lasted one and a half minutes. Janszen called Pete Rose's home at 4:20 p.m. from his car phone. The call lasted one and a half minutes. Janszen called Pete Rose's home at 4:47 p.m. from his car phone. The call lasted seven minutes. Janszen called Atlanta/Fulton County Stadium from his car phone at 4:55 p.m. The call lasted one and a half minutes. Janszen called Pete Rose's home at 5:01 p.m. from his car phone. The call lasted two minutes. Janszen called Peters from his car phone at 6:45 p.m. The call lasted one and a half minutes. A call was placed from Pete Rose's home to the Atlanta stadium at 6:54 p.m. The call lasted four minutes. A call was placed from Pete Rose's home to Peters at 7:07 p.m. The call lasted one minute. Janszen called Pete Rose's home at 10:54 p.m. from his car phone. The call lasted one minute. Eighteen calls were placed from Pete Rose's home to the sports line between 12:09 a.m. and 11:52 p.m. According to Peters' records, Rose bet $2,000 each on the Reds, the Mets, Los Angeles, San Diego, Toronto and Boston. He won two and lost four bets.

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On June 20, 1987, the Reds played the Braves in Atlanta at 1:20 p.m. and lost 8-6. Telephone records indicate a call was placed from Pete Rose's home to Atlanta/Fulton County Stadium at 12:58 p.m. The call lasted three minutes. Three calls were placed from Pete Rose's home to Peters at 1:13 p.m., 1:16 p.m. and 1:18 p.m. Each call lasted one minute. A call was placed from Pete Rose's home at 1:17 p.m. to the golf course in Franklin, Ohio, that Peters frequented. The call lasted one minute. Two more calls were placed from Pete Rose's home to Peters at 7:21 p.m. and 7:46 p.m. The calls lasted two minutes and one minute. Nineteen calls were placed from Pete Rose's home to the sports line between 12:10 a.m. and 11:42 p.m. According to Peters' records, Rose bet $2,000 each on the Reds, Toronto, Minnesota, Boston, Houston, the Mets, St. Louis and San Diego. He won four and lost four bets.

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On June 21, 1987, the Reds played the Braves in Atlanta at 2:10 p.m. and won 6-5 in ten innings. Telephone records indicated a call was placed from Pete Rose's home to Peters at 11:47 a.m. The call lasted one minute. A call was placed from Pete Rose's home to Atlanta/Fulton County Stadium at 1:21 p.m. The call lasted three minutes. A call was placed from Pete Rose's home to Peters at 1:25 p.m. The call lasted three minutes. Four calls were placed from Pete Rose's home to Atlanta at 1:45 p.m., 2:02 p.m., 2:36 p.m. and 10:23 p.m. Janszen called the Marriott Marquis in Atlanta at 9:21 p.m. from his car phone. The call lasted two and a half minutes. Fourteen calls were placed from Pete Rose's home to the sports line between 5:21 a.m. and 4:52 p.m. Janszen called the sports line at 6:45 p.m. and 8:00 p.m. According to Peters' records, Rose bet $2,000 each on the Reds, Toronto, Minnesota, St. Louis, the Cubs and San Francisco. He won all six bets.

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June 22, 1987 was an off day for the Reds. Telephone records indicate a call was placed from Pete Rose's home to Atlanta at 1:18 p.m. The call lasted two minutes. Janszen called Pete Rose's home from his car phone at 11:57 a.m., 1:53 p.m. and 2:58 p.m. The calls lasted one minute, one and a half minutes, and two and a half minutes. A call was placed from Pete Rose's home to Peters at 5:18 p.m. The call lasted two minutes. Four calls were placed from Pete Rose's home to the sports line at 5:52 p.m., 7:43 p.m., 8:43 p.m. and 9:04 p.m. According to Peters' records, Rose did not bet on this day.

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On June 23, 1987, the Reds played the Giants in San Francisco at 7:35 p.m. (Pacific Coast time) and won 4-1. Telephone records indicate nine calls were placed from Pete Rose's home to Peters at 11:28 a.m., 12:44 p.m., 1:16 p.m., 1:56 p.m., 2:28 p.m., 3:30 p.m., 4:37 p.m. and 5:36 p.m. Each call lasted between one and four minutes. Janszen called Peters at 6:45 p.m. The call lasted one minute. A call from Pete Rose's home was placed at 6:45 p.m. to the Ramada Renaissance in San Francisco, where the Reds stayed during this road trip. The call lasted two minutes. A call was placed from Pete Rose's home to Candlestick Park at 6:57 p.m. The call lasted four minutes. Janszen called Peters at 7:05 p.m. The call lasted three minutes. Two calls were placed from Pete Rose's home to the sports line at 11:13 p.m. and 11:28 p.m. According to Peters' records, Rose did not bet on this day.

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On June 24, 1987, the Reds played the Giants in San Francisco at 1:05 p.m. (Pacific Coast time) and won 5-4 in ten innings. Paul Janszen was in Los Angeles. Telephone records indicate Janszen called the Reds' hotel in San Francisco from Santa Monica at 12:43 p.m. and 12:56 p.m. The calls lasted three minutes and five minutes. Janszen called Candlestick Park at 12:49 p.m. from Santa Monica. The call lasted four minutes. Janszen called Candlestick Park from Los Angeles at 4:11 p.m. The call lasted one minute. Janszen called Peters from Los Angeles at 4:13 p.m. The call lasted six minutes. Janszen called Candlestick Park from Los Angeles at 4:31 p.m. The call lasted three minutes. Janszen called Candlestick Park from Los Angeles at 4:35 p.m. The call lasted three minutes. Janszen called Peters from Los Angeles at 4:38 p.m. The call lasted four minutes. Janszen called the Reds' hotel in San Francisco from Santa Monica at 7:59 p.m. and 10:49 p.m. The calls lasted one minute and five minutes. Janszen called the sports line six times between 1:37 p.m. and 10:44 p.m. According to Peters' records, Rose bet $2,000 each on Los Angeles, the Mets, Houston, Baltimore and California. He won all five bets.

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On June 25, 1987, the Reds played the Giants at San Francisco at 7:35 p.m. (Pacific Coast time) and lost 7-6. Telephone records indicate Janszen called Peters from Santa Monica at 9:22 a.m. The call lasted three minutes. Janszen called the Reds' hotel in San Francisco from Santa Monica at 10:49 a.m. The call lasted six minutes. Janszen called Peters from Los Angeles at 12:44 p.m. The call lasted two minutes. Between 2:27 p.m. and 10:48 p.m., Janszen called the sports line from Los Angeles seven times. According to Peters' records, Rose bet $2,000 on the Mets and won.

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On June 26, 1987, the Reds played the Dodgers in Los Angeles at 7:35 p.m. (Pacific Coast time) and won 6-0. Janszen was in Los Angeles and stayed at the same hotel as the Reds. Telephone records indicate Janszen called Peters from Los Angeles at 9:11 a.m. The call lasted one minute. Janszen called Peters from Beverly Hills at 12:43 p.m. The call lasted two minutes. Janszen called Peters from North Hollywood at 4:07 p.m. The call lasted five minutes. Janszen called the sports line from Los Angeles at 5:42 p.m., 8:58 p.m. and 11:58 p.m. According to Peters' records, Rose bet $2,000 each on the Reds, St. Louis, the Cubs, the Giants, Toronto, Texas, Kansas City and the Yankees. He won three and lost five bets.

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On June 27, 1987, the Reds played the Dodgers in Los Angeles at 7:05 p.m. (Pacific Coast time) and lost 4-3 in ten innings. Telephone records indicate Janszen called Peters from Los Angeles at 9:25 a.m. The call lasted one minute. Janszen called Peters from Los Angeles at 10:22 a.m. The call lasted six minutes. Janszen called Peters from Los Angeles at 6:15 p.m. The call lasted one minute. Between 12:31 p.m. and 10:38 p.m., Janszen called the sports line from Pasadena and Los Angeles sixteen times. According to Peters' records, Rose bet $2,000 each on the Reds, Pittsburgh, the Mets, San Francisco, San Diego, Kansas City and Toronto. He won five and lost two bets.

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On June 28, 1987, the Reds played the Dodgers in Los Angeles at 1:05 p.m. (Pacific Coast time) and lost 4-2. Telephone records indicate Janszen called Peters at 8:48 a.m., 9:23 a.m. and 10:00 a.m. The calls lasted two minutes, four minutes and eight minutes. Between 11:51 a.m. and 10:23 p.m., Janszen called the sports line seven times from Los Angeles, Burbank and Inglewood. According to Peters' records, Rose bet $2,000 each on the Reds, St. Louis, Philadelphia, the Cubs, San Francisco, Minnesota and Detroit. He won four and lost three bets.

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June 29, 1987 was an off day for the Reds. Telephone records indicate Janszen called Peters at 4:41 p.m. and 4:48 p.m. The calls lasted one minute each. Four calls were placed from Pete Rose's home to Peters at 6:28 p.m., 6:33 p.m. and 7:09 p.m. The calls lasted two minutes, one minute, one minute and five minutes. A call was placed from Janszen's home to the sports line at 11:49 p.m. According to Peters' records, Rose bet $2,000 each on Montreal, the Mets, Atlanta, Los Angeles, California, Detroit, Minneapolis, Toronto, Boston and Texas. He won five and lost five bets.

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On June 30, 1987, the Reds played the Astros in Cincinnati at 7:35 p.m. and won 5-4 in ten innings. Telephone records indicate Marcum called Pete Rose at the Reds' clubhouse at 6:40 p.m. Between 12:11 a.m. and 11:12 p.m., Janszen made eighteen calls to the sports line. According to Peters' records, Rose bet $2,000 each on the Reds, Pittsburgh, San Diego, Cleveland, Texas and Minnesota. He won three and lost three bets.

* * * * * * * * * *

On July 1, 1987, the Reds played the Astros in Cincinnati at 7:35 p.m. and won 6-4. Telephone records indicate Janszen called Peters at 7:07 p.m. The call lasted one minute. Between 10:15 p.m. and 10:22 p.m., Janszen called the sports line six times. According to Peters' records, Rose bet $2,000 each on the Reds, Pittsburgh, San Diego, Cleveland, Texas and Minnesota. He won three and lost three bets.

* * * * * * * * * *

On July 2, 1987, the Reds played the Mets in Cincinnati at 7:35 p.m. and lost 5-0. Telephone records indicate Janszen called Franklin, Ohio, at 6:53 p.m. and 7:08 p.m. The calls lasted one minute and four minutes. Between 12:41 a.m. and 11:41 p.m., Janszen called the sports line seven times. According to Peters' records, Rose bet $2,000 each on the Reds, California, Seattle, Oakland, Philadelphia and Kansas City. He won four and lost two bets.

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On July 3, 1987, the Reds played the Mets in Cincinnati at 7:35 p.m. and won 8-3. Between 12:24 a.m. and 7:17 p.m., Janszen called the sports line ten times. According to Peters' records, Rose bet $2,000 each on the Reds, the Yankees, Minnesota, Oakland, California, Detroit, Montreal, Philadelphia, Pittsburgh and Atlanta. He won seven and lost three bets.

* * * * * * * * * *

On July 4, 1987, the Reds played the Mets in Cincinnati at 7:05 p.m. and won 7-3. Telephone records indicate Janszen called Peters at 1:52 p.m. The call lasted one minute. Janszen called Peters at 2:27 p.m. The call lasted one minute. Marcum called Pete Rose at the Reds' clubhouse at 5:20 p.m. Janszen called Pete Rose at the Reds' clubhouse at 5:25 p.m. Marcum called Pete Rose at the Reds' clubhouse at 5:56 p.m. Between 2:11 a.m. and 9:05 p.m., Janszen called the sports line four times. According to Peters' records, Rose did not bet on this day.

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On July 5, 1987, the Reds played the Mets in Cincinnati at 2:15 p.m. and won 7-5. Telephone records indicate Marcum called Pete Rose at the Reds' clubhouse at 12:11 p.m. Janszen called Franklin, Ohio, at 1:08 p.m. The call lasted two minutes. Between 2:18 p.m. and 7:17 p.m., Janszen called the sports line six times. According to Peters' records, Rose did not bet on this day.

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VI. GUIDING LEGAL PRINCIPLES

This is not a criminal case, but rather a private administrative matter. You have asked for guidance on the questions of circumstantial evidence; credibility of witnesses who have been convicted of a crime; credibility of witnesses who may have an interest in the outcome; or credibility of witnesses who may be biased in some way.

Set forth below are jury instructions to guide you as the ultimate trier of fact. These instructions have been approved for juries in criminal trials in the United States District Courts by the United States Court of Appeals for the Second Circuit in New York. While counsel may debate certain portions of these instructions, our experience teaches that they fairly state the law.

A. Circumstantial Evidence

> If a party in court is trying to prove an event and an eye-witness testifies that he saw the event happen, that is direct evidence and, of course, there are many other types of direct evidence that I could mention. But one clear example is the eye-witness testimony of a particular event.
>
> Circumstantial evidence, on the other hand, is where one fact or chain of events gives rise to a reasonable inference of another fact. If one fact or group of facts on the basis of common sense and common experience leads you to logically and reasonably infer other facts, then this is circumstantial evidence. Circumstantial evidence is no less valid and no less weighty than direct evidence provided that the inferences drawn are logical and reasonable. In a case where a defendant's state of mind is at issue, where there are questions of what the defendant intended or what his purpose was, circumstantial evidence is often an important means of proving what the state of mind was at the time of the events in question. Sometimes it is the only means of proving state of mind.

Supplemental charge:

> . . . [Y]ou must consider all the circumstances and see whether the circumstances, taking into consideration everything known to you, everything in the evidence, to see whether from

all those circumstances an inference can logically and reasonably be drawn towards a particular fact.

Putting it another way, what, if any, are the logical and reasonable inferences that can be drawn from a set of circumstances. Sometimes none can. Sometimes it is even-stephen, one way or the other, and you just can't draw any particular inferences one way or the other. Sometimes the inferences tend to go in a particular direction quite logically and reasonably and if it does go in that direction, then that is what the jury is entitled to consider.[469]

B. Witness Credibility

1. Personal Interest of the Defendant in the Outcome of the Trial

Now the law permits but does not require the defendant to testify on his own behalf. Obviously a defendant has a deep personal interest as a result of his prosecution, indeed it is fair to say, he has the greatest interest in its outcome.

Interest creates a motive for false testimony and a defendant's interest in the result of his trial is of a character possessed by no other witness.

In appraising his credibility, you may take that fact into consideration.

However, I want to say this with equal force to you—however, it by no means follows that simply because a person has a vital interest in the end result, that he is not capable of telling a truthful and straightforward story.

It is for you to decide to what extent, if at all, defendant's interest has affected or colored his testimony.[470]

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[469] United States v. Dizdar, 581 F.2d 1031 (2d Cir. 1978).

[470] *United States v. Martin*, 525 F.2d 703 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975).

2. Testimony of Informant

> In considering [the testimony of an informant] you may take into account that in certain types of crime the government, of necessity, is compelled to rely upon those who are willing to consort with criminals or persons suspected of crime for the very purpose of obtaining information and evidence needed to maintain a prosecution. Indeed, it would be most difficult to detect or prosecute some wrongdoers, and this is particularly true in conspiracy cases. Informers are themselves often in trouble with the law or have prior records, which make it possible for them to be accepted by persons engaged in crime as one of their own. . .
>
> The testimony of an informer who provides evidence against a defendant for pay, or for personal advantage or vindication, or for immunity from punishment for his own acts, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. You must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.
>
> If you find [the informer's] testimony was deliberately untruthful, you should unhesitantly reject it.
>
> On the other hand, if upon a cautious and careful examination, you are satisfied that he has given a truthful version of the events which occurred, there is no reason why you should not accept it.[471]

3. Testimony of a Witness Convicted of a Crime

> The testimony of [a witness convicted of a crime or who has engaged in any immoral or dishonest act] must also be considered with great care and caution. . .Nevertheless, it does not follow that because [he has] acknowledged participation in a

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[471] *United States v. Corcione*, 592 F.2d 111 (2d Cir.), *cert. denied*, 440 U.S. 985 (1979).

> crime or is an accomplice that he is not capable of giving a truthful version of what occurred.
>
> You should ask yourselves these questions:
>
> Did [the witness] give false testimony or color his testimony contrary to fact, because he has not been prosecuted in the remaining charges or believes that his cooperation may result in more lenient treatment?
>
> If you find his testimony was deliberately untruthful, you should unhesitantly reject it.
>
> On the other hand, if, upon a cautious and careful examination, you are satisfied that he has given a truthful version of essential events, there is no reason why you should not accept it.[472]

VII. SUMMARY OF THE EVIDENCE

Pete Rose denied under oath placing bets or causing others to place bets on the Cincinnati Reds and other ball games of Major League Baseball. Indeed, Rose denied under oath ever associating with anyone placing bets on his behalf on the Cincinnati Reds or the games of Major League Baseball. He admitted placing bets with Tommy Gioiosa on other sports activity, but denied knowing the Ohio bookmaker or other bookmakers in New York. He denied being delinquent in paying his gambling losses or having borrowed from his associates and friends to pay his gambling losses.

A. The Key Evidence

The evidence should be viewed as a whole in order to obtain a clear picture. Nevertheless, it is important to note the following five distinct pieces of evidence pointing to Pete Rose's betting on the Reds and baseball:

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[472] *United States v. Corcione,* 592 F.2d 111 (2d Cir.), *cert. denied,* 440 U.S. 985 (1979).

First, the three page document in Rose's handwriting recording baseball games and the results. Pete Rose's explanation that he does not recognize the document or the handwriting is perhaps the only answer he can render given his posture in this case.

Second, the notebook of Paul Janszen recording the betting action of Pete Rose from April 7, 1987 to May 3, 1987, on Reds games as well as other games. To those who might suggest the notebook was fabricated by an unpaid creditor, the next piece of evidence should be closely examined.

Third, the telephone traffic in the collective telephone records bears remarkable witness to the betting action before game time of the Cincinnati Reds—home or away, night or day—particularly the unexplained calls from Rose's home and hotel rooms to Chevashore, Val and Peters during the baseball season. Rose offered no explanation for these telephone calls.

Fourth, the betting records of Ron Peters which show baseball betting action on the Reds and other Major League Baseball games in 1987 by one customer.

Fifth, the unguarded statements of Steve Chevashore on tape contradicted Rose's statement that Janszen, Chevashore and Val were not involved in the sports betting action on the Cincinnati Reds or Major League Baseball for Pete Rose.

Sixth, the Bertolini tape reveals not only serious questions as to Rose's testimony about his gambling habit, but the *modus operandi* employed by Rose to disguise and conceal his enormous gambling indebtedness, the identity of his bookmakers and his betting on baseball. The generating of funds through loans to Bertolini, the remission of checks to fictitious payees, and the delay in the production of bank records from Star Bank and Oak Hills Savings and Loan all raise serious questions whether Pete Rose is trying to conceal his gambling on baseball and the Reds.

B. Summary of the Testimony of Ron Peters

The sworn, voluntary, corroborated testimony of Ron Peters, the bookmaker from Franklin, Ohio, establishes that he took bets at $2,000 per game on the Reds and other Major

League baseball teams from Pete Rose, and from Tommy Gioiosa, Paul Janszen and Danita Marcum on behalf of Pete Rose. Peters testified that he would not extend credit of $2,000 per game to Gioiosa, Janszen and Marcum personally, but did so because the bets were for Pete Rose. He testified that he received telephone calls for Rose, and that he collected Rose's betting losses from, and paid Rose's winnings to, Gioiosa and Janszen. Peters testified that Rose, through Gioiosa and Janszen, provided tickets to him for the Reds games in 1986 and 1987. He received a Mizuno bat autographed by Pete Rose when Rose visited Jonathan's Cafe, Peters' restaurant, with Gioiosa and Fry. During that visit, Peters gave Gioiosa $37,000 in winnings for Pete Rose in a back room of the restaurant. Peters recalled Gioiosa attempted to pay him in 1986 with three $8,000 checks signed by Pete Rose. Peters stopped taking bets from Rose in the fall of 1986, after the baseball season, because Rose refused to pay him $34,000 from past betting. Peters testified Gioiosa told Peters that Rose was unable to pay Peters because Rose owed money to a bookmaker in New York.

Peters testified that in mid-May 1987, he resumed taking Rose's bets from Janszen after Janszen gave him a copy of Rose's $34,000 check, dated March 12, 1987, payable to Gioiosa and signed by Reuven Katz, the attorney for Pete Rose. Peters testified that Rose was his only baseball betting customer in 1987. He testified that Rose won $27,000 in May 1987 and $40,000 in June 1987 on baseball games including the Reds. He testified that he refused to pay Rose because Rose still owed him $34,000. Peters testified that as a result, Rose stopped betting with him in mid-July 1987. Peters recalled that Janszen tried to collect the $40,000, because Rose was also indebted to Janszen for $40,000. Peters refused to pay Janszen the $40,000 but later gave Janszen three checks totaling $6,000—the difference between what Peters owed Rose and what Rose owed Peters.

Peters recorded a telephone conversation with Robert Pitcairn, Rose's attorney, on his own initiative after being contacted by your investigators. Pitcairn was returning a call Peters made to Reuven Katz to find Pete Rose to inform him of your inquiry. During their conversation, Peters was surprised that Pitcairn did not question who Peters was or dispute Peters' statement that he took bets from Rose.

1. Summary of Corroboration of Peters' Testimony

- Ron Peters' testimony is corroborated by the testimony of James Eveslage who voluntarily told us that he arranged for Peters to accept Pete Rose's betting through Gioiosa.

- Ron Peters' testimony is also corroborated by Mike Fry. Fry observed Gioiosa placing bets for Pete Rose while Gioiosa was the Manager of Gold's Gym, which Fry owned. Fry voluntarily admitted loaning Pete Rose $17,000 and $30,000 in the fall of 1985, after the baseball season, to pay Rose's gambling losses. Fry admitted cashing checks for Gioiosa in February 1986 in order for Gioiosa to pay Peters. Fry's endorsement appears on the checks. Fry further stated Gioiosa and Janszen could not have afforded to bet $2,000 per game with Peters. Fry stated that he went with Pete Rose and Gioiosa to visit Jonathan's Cafe.

- Ron Peters' testimony is also corroborated by Lance Humphrey, the daytime manager of Gold's Gym. Humphrey testified that Gioiosa told him that he was betting for Rose on baseball, basketball and football with Ron Peters at $1,000 to $5,000 per game. Humphrey testified that Gioiosa could not afford to place bets of that size.

- Ron Peters' testimony is corroborated by the telephone records of Gold's Gym for 1986 which show sixty-five telephone calls from Gold's Gym to Ron Peters during the 1986 baseball season, when Tommy Gioiosa was manager of Gold's Gym.

- Ron Peters' testimony is corroborated by the three $8,000 checks signed by Pete Rose on February 5, 1986, endorsed by Fry and cashed by Gioiosa.

- Ron Peters' testimony is corroborated by Rose's $34,000 check, dated March 12, 1987, signed by Reuven Katz, and endorsed and cashed by Tommy Gioiosa.

- Ron Peters' testimony is corroborated by the phone records of Rose, Janszen and the Cincinnati Reds, and by the hotel bills of Pete Rose during May, June and July 1987. These records show a pattern of telephone traffic prior to the beginning of each Reds game—home or away, night or day—between Janszen, Marcum, Rose and Peters.

- Ron Peters' testimony is corroborated by the sworn admissions of Pete Rose during his deposition. Rose testified that he gave his bets to Gioiosa to place with a bookmaker; that he had Gioiosa pay his gambling losses and collect his winnings; that he signed the three $8,000 checks on February 5, 1986 for Gioiosa to pay his gambling losses; that he directed his attorney, Reuven Katz, to give a $34,000 check to Gioiosa to pay his gambling losses; that he cannot explain how a copy of the $34,000 check was in the possession of Ron Peters and Paul Janszen in May 1987; that he did send Mike Bertolini eleven checks totalling $88,000 in October, November and December 1986, which is the time when Gioiosa told Peters that Pete Rose was unable to pay Rose's $34,000 debt to Peters due to Rose's indebtedness to a mafia bookmaker in New York; that he visited Jonathan's Cafe with Gioiosa, where he gave an autographed bat to Ron Peters for his restaurant and Gioiosa met with Peters in a back room; and that he ordered tickets to Reds games for Peters in 1986 and 1987, which he explained by saying that someone else must have asked him for the tickets.

- Ron Peters' testimony is corroborated by the transcript of his conversation with Rose's counsel, Robert Pitcairn, on March 13, 1989, prior to any publicity about Peters. Pitcairn returned Peters' call to Katz and made inquiries about the Commissioner's investigation without asking Peters who he was and without disputing Peters' statement that Pete Rose bet with him.

- Ron Peters' testimony is corroborated by the voluntary sworn testimony of Paul Janszen and Danita Marcum who testified that they placed bets of $2,000 per game at the request of Pete Rose with Ron Peters on the Reds and other baseball games during May, June and July 1987.

- Ron Peters' testimony is corroborated by betting sheets obtained from Rose's home and found by an expert to be in Rose's handwriting. The betting sheets contain a listing of Major League Baseball games, including the games of the Cincinnati Reds, with the results.

- Ron Peters' testimony is corroborated by the voluntary sworn testimony of Jim Procter and Dave Bernstein. Procter overheard Rose betting on baseball games with Paul Janszen, and Bernstein was advised by Janszen in the spring of 1987 that Rose was betting on baseball and the Reds with Ron Peters.

- Ron Peters' testimony is corroborated by his own betting records, which show bets on the Reds and other baseball games. The records also indicate that Peters had only one baseball betting customer in 1987. These records also bear the names of "Pete" and "Janszen" in Peters' handwriting.

- Ron Peters' testimony is corroborated by the report of the gambling expert who authenticated and verified Peters' betting records for 1987. His report states that Peters had only one customer during that season.

- Ron Peters' testimony is corroborated by the telephone toll records from Pete Rose's home and hotel room during May and June 1987. The records reveal telephone calls to Ron Peters' telephone number before the start of the games of the Cincinnati Reds.

It should be noted that Ron Peters bears no animus toward Pete Rose—Peters recovered his 1986 losses on baseball betting by not paying Rose the $34,000 in 1987. Ron Peters gained nothing by his voluntary sworn statements against Rose. Ron Peters gave this testimony about Pete Rose against Peters' penal interest, that is, Peters' statements were incriminating and exposed him to prosecution for conducting an illegal bookmaking operation. Admissions against penal interest are considered trustworthy under the Federal Rules of Evidence. His testimony and his voluntary pleas of guilty to federal offenses are acts of integrity.

I find Ron Peters worthy of belief in view of the independent corroboration of his testimony.

C. Summary of the Testimony of Paul Janszen

Paul Janszen has given voluntary, sworn testimony, without promise of reward, that in April, May, June and July 1987 he placed bets of $2,000 per game on the Cincinnati Reds and other Major League Baseball teams for Pete Rose with Steve Chevashore, a runner of bets in Florida; with Val, a clerk for a bookmaking operation in New York; and with Ron Peters, a bookmaker in Franklin, Ohio. Janszen testified that Rose gave him the bets in person and on the telephone and that he or his girlfriend, Danita Marcum, called in the bets to Chevashore, Val or Peters. Janszen testified that he paid Rose's gambling losses with cash from Rose, and from his own cash when Rose was short of cash. He testified that he gave the status of bets on baseball games by hand signals to Pete Rose while the Cincinnati Reds were playing, during the time period when the scoreboard at Riverfront Stadium reporting the scores of other ball games was not working.

Janszen testified that Rose refused to repay him the $40,000 of his own money which he used to pay Rose's gambling losses. Janszen testified that Rose told him to collect his money from Peters, who owed Rose $40,000 in winnings. Janszen testified that he arranged for tickets with Pete Rose for Peters to attend a Reds game in 1987. He testified that he accompanied Rose on card shows and that he would count and hold the cash paid to Rose, which Rose used to pay his gambling debts.

Janszen testified that Rose bet with Ron Peters through Gioiosa in the fall of 1986 on the National League baseball playoffs and other sports events. He recalled Peters refusing to take any more bets from Rose in 1986 because Rose was delinquent in his gambling debts.

Janszen testified that he and Marcum were invited and stayed with Rose and Rose's family in Florida for Spring training in 1987. He testified that while in Florida, Pete Rose introduced him to Steve Chevashore and asked Janszen to place bets on sports events with Chevashore. Janszen testified that in April 1987, at the beginning of the baseball season, Rose asked him to continue placing bets on sports events, including the Reds games and other Major League games. Janszen testified that Rose would often write down the teams on which he wanted Janszen to place bets. He testified that he bet on the Reds and other baseball teams for Rose from April 6 to April 17, 1987 with Steve Chevashore; from April 17 to May 13, 1987 with Val in New York; and from May 17 to mid-July 1987 with Ron Peters—all at $2,000 per game and all at the request of Pete Rose. Janszen testified that he could not afford to bet $2,000 a game, and that the bookmakers would not extend credit to him for that amount.

Janszen testified that in mid-May 1987, Val refused to accept any more bets from Rose because Rose failed to pay his gambling losses. Janszen testified that Chevashore called Rose to collect the gambling losses and Rose told Chevashore that Janszen was betting in Rose's name. Janszen testified that Rose turned to him after the call from Chevashore and told Janszen not to worry because Chevashore was afraid of Janszen.

Janszen testified that Mike Bertolini was a photographer, card show promoter and memorabilia salesman, as well as a runner of bets for Pete Rose to another New York bookmaker. Bertolini told Janszen that Pete Rose bet on baseball and was indebted to New York bookmakers.

Janszen testified that Rose asked him to contact Ron Peters about taking bets from Rose. Janszen testified that Peters would not take Rose's bets because Rose owed him $34,000. Janszen testified that when he told Rose about Peters' response, Rose gave Janszen a copy of the $34,000 check dated March 12, 1987, payable to Tommy Gioiosa and signed by Reuven Katz, to give to Peters. Janszen testified that Peters told Janszen he never received any of the money from Gioiosa. Janszen testified that he gave a copy of the $34,000 check to Peters and Peters agreed to resume taking Rose's bets, which included bets on the Reds and Major League Baseball.

Janszen testified that Rose won $27,000 from Peters in the first week of betting, which Janszen collected and gave to Rose in cash. He testified that Rose lost $20,000 the second week, and that he collected cash from Rose and paid Peters for the losses. Janszen testified that Rose won $40,000 from Peters during June and early July, but that Peters refused to pay Rose. As a result, Rose stopped betting with Peters.

Janszen testified that Rose told him to collect from Peters the $40,000 Rose owed Janszen. He testified that he tried to collect the $40,000 from Peters and Peters refused to pay Janszen because Rose owed Peters $34,000. Janszen testified that eventually Peters paid Janszen three checks for $2,000 each, representing the difference between the amount Rose owed Peters and the amount Peters owed Rose. Janszen testified that those checks are now in the possession of the FBI in Cincinnati. Janszen testified that he placed no more bets for

Rose because Rose refused to pay Janszen the money Janszen had expended on Rose's behalf.

Janszen testified that he visited Reuven Katz, counsel for Rose, early in 1988 seeking payment of the money from Rose because he needed it to hire an attorney for his criminal case. Janszen told Katz that Rose had bet on baseball. Janszen testified that Katz replied that it was "over" for Pete Rose. Shortly thereafter Katz arranged for a $10,000 check on Rose's account to be paid to Janszen. Katz told Janszen he wanted the check to appear as a loan. Janszen testified that Katz did not ask Janszen to sign a promissory note to Rose and Rose has never sought repayment of the $10,000 from Janszen.

Janszen provided copies of letters to Katz and Pitcairn, Rose's counsel, which demand payment by Rose of the outstanding money owed to Janszen by Rose. Janszen admitted trying to collect the debt from Rose, and being upset with Rose for using him and failing to pay the debt, all of which is reflected in the correspondence he voluntarily furnished to us.

Janszen admitted tape recording the conversations with Michael Bertolini on April 4, 1988 and with Steve Chevashore on December 27, 1988. Janszen provided copies of Rose's betting sheets in Rose's handwriting which he obtained from Rose's home, and copies of his own notebook recording the bets for Pete Rose from April 8, 1987 through May 13, 1987.

1. Summary of Corroboration of Janszen's Testimony

- Paul Janszen's testimony is corroborated by the voluntary sworn testimony of Danita Marcum, Ron Peters, Jim Procter, David Bernstein, the unguarded statements of Steve Chevashore on the tape of December 27, 1988, the unguarded statements of Mike Bertolini on the tape of April 4, 1988, and the statements of Mike Fry.

- Paul Janszen's testimony is corroborated by the betting sheets he obtained from the home of Pete Rose, which record the results of the Reds and other baseball games. The handwriting expert has established from the handwriting exemplars of Rose and the 1987 handwriting samples of Rose that the three sheets are in the handwriting of Pete Rose. Another handwriting expert has established that the three sheets are not in the handwriting of Paul Janszen or Danita Marcum.

- Paul Janszen's testimony is corroborated by his own notebook in which he recorded the betting results of Reds games. The bets in Janszen's notebook match the games and results of the three sheets in Rose's handwriting. The handwriting expert has established that the writing in the notebook is that of Janszen and Marcum.

- Paul Janszen's testimony is corroborated by the betting records of Ron Peters. Peters betting records show betting on the Reds and other baseball teams by one customer in 1987. These records bear the names of Janszen and "Pete."

- Paul Janszen's testimony is corroborated by the gambling expert who has found all of the betting records to be authentic and correct based upon a comparison with the schedules, betting lines and results of Major League Baseball in 1987.

- Paul Janszen's testimony is corroborated by the collective telephone traffic which shows continuous contact between Janszen and Rose and (1) between Janszen and Chevashore from April 8 to 17; (2) between Janszen and Val from April 17 to May 13; and (3) between Janszen and Peters from May 17 to July 5, 1987—just before game time for the Reds—home or away—night or day.

- Paul Janszen's testimony is corroborated by the taped conversation with Steve Chevashore in which Chevashore acknowledged that Janszen was betting for Rose with Val; that Rose was delinquent in paying his gambling losses; that Danita Marcum placed bets on the Cincinnati-Montreal game for Rose; that Chevashore called Rose to collect Rose's debts; that Rose denied betting after the Reds-Mets series and that Rose said Janszen was betting in Rose's name; that "the bosses" in New York held Rose responsible; that Janszen could not afford to bet $2,000 per game; and that Bertolini was in trouble with people in New York.

- Paul Janszen's testimony concerning the debt owed to him by Rose is corroborated by Bertolini's remark in the April 4, 1988 conversation with Janszen, when after Janszen told Bertolini that Rose owed him $12,000, Bertolini asked whether Rose had paid Janszen $38,000; by the testimony of Ron Peters that Janszen tried to collect the debt from Rose's winnings; by Peters' testimony that he paid Janszen the difference between what Peters owed Rose and what Rose owed Peters; by the $10,000 check—"for loan"—given to Janszen by Rose's counsel in March 1988 to pay Janszen's attorney's fees for Janszen's criminal case for which neither Katz nor Rose has ever sought repayment; by the correspondence between Janszen, his attorney and Rose's counsel in which Janszen asserted his claim for monies due, which Rose's counsel did not dispute; and by the statement of Mark Stowe, the Assistant Clubhouse Manager of the Cincinnati Reds, who asked Rose, in the spring of 1989, why he had a falling out with Paul Janszen and Rose told him it was over betting losses owed to Janszen which Rose told Janszen to collect from someone else who owed money to Rose.

- Paul Janszen's testimony that Pete Rose bet on the Reds and baseball with another bookmaker in New York, through Mike Bertolini, and that Pete Rose used the cash from card shows, memorabilia sales, and loans arranged for Bertolini and Bertolini's company, Hit King Marketing, Inc., to pay gambling losses is corroborated by the unguarded taped conversation of April 4, 1988 in which Bertolini acknowledged the following: the indebtedness to the New York bookmakers by Rose; Rose's conversations with the bookmakers; the enormous indebtedness of Rose for gambling losses; the payment of $150-$200,000 in betting losses; the outstanding debt of $200,000; the indebtedness of Rose to Bertolini; and the gambling habit of Pete Rose. During the conversation, Bertolini said that he was the only proof of Rose's betting and he would "die" before he told on Pete Rose.

- Paul Janszen's testimony that Bertolini was betting on baseball for Pete Rose is corroborated by Rose's bank records for an account at Oak Hills Savings and Loan in Cincinnati. The account was used to funnel checks in the fall of 1986, after the baseball season ended, to Bertolini in amounts under $10,000 and made payable to fictitious payees. The checks were cashed by Bertolini at a check cashing service in New York to pay the bookmaker in New York.

- Paul Janszen's testimony concerning the placing of bets on the Reds for Pete Rose is corroborated by the voluntary, sworn testimony of Danita Marcum, who verified all of Janszen's testimony concerning his relationship with Rose; the events at Spring training in Florida; the betting sheets in Rose's handwriting; the notebook in her and Janszen's handwriting; and placing the bets with Chevashore, Val and Peters. More significantly, Danita Marcum testified that she took bets directly from Pete Rose on the Reds and other baseball games and placed those bets for Rose with Val and Peters. Her recollection is corroborated by Peters' testimony that he took bets from Marcum for

Pete Rose on Reds game, and by Chevashore's statements recounting Marcum's betting on the Cincinnati-Montreal game in May 1987.

- Paul Janszen's testimony is further corroborated by the voluntary sworn testimony of Ron Peters, who admitted taking bets from Rose and Janszen on the Reds.

It is quite significant that Peters and Janszen were not friends or close associates. At the time of their testimony, Peters possessed a bitter animosity towards Janszen because Janszen assisted the government in catching Peters engaging in activity which led to Peters' arrest, indictment and conviction.

Notwithstanding this animosity, Peters corroborates Janszen. Peters testified that he began taking bets from Janszen on behalf of Rose in mid-May 1987 after Janszen gave him a copy of the $34,000 check of March 12, 1987 signed by Katz. He testified that Rose won $27,000 the first week, which he paid to Janszen for Rose; lost $24,000 the second week, which Janszen paid him in cash for Rose; and won $40,000 in June and early July which he refused to pay Rose because Rose still owed him $34,000 from earlier betting. Peters testified that he took bets for Pete Rose from Danita Marcum during May, June and early July 1987. Peters also received tickets to Reds games for Pete Rose through Paul Janszen.

- Paul Janszen's testimony is corroborated by the sworn testimony of David Bernstein and Jim Procter. Bernstein and Procter observed and heard Janszen taking bets on baseball games from Pete Rose during the 1987 season. Bernstein and Procter were also told by Janszen that Rose bet on the Reds. Bernstein also witnessed Janszen giving the status of bets to Pete Rose with hand signals at Riverfront Stadium when the Reds scoreboard, reporting the scores of other baseball games, was not working.

In view of this independent corroborative evidence, I find Paul Janszen's testimony worthy of belief.

D. Analysis of Rose's Testimony in Light of the Evidence

- It is difficult to square Rose's sworn testimony with the sworn voluntary testimony of other witnesses, and the betting records in Rose's handwriting and the handwriting of others.

- Pete Rose testified he did not recognize the handwriting on the three betting sheets found in his home. Yet, according to a handwriting expert, the games of the Cincinnati Reds are recorded in Rose's handwriting on the betting sheets.

- Pete Rose testified that he never bet on the Reds or on baseball with Ron Peters. Yet, his bets on the Reds and baseball appear in Peters' betting records for the 1987 baseball season.

- Pete Rose testified that he never bet on the Reds or baseball with Paul Janszen or Danita Marcum. Yet, the records of Janszen and Marcum show bets on the Reds and baseball during the 1987 baseball season.

- Pete Rose did not explain how Ron Peters and Paul Janszen came into possession of a copy of the $34,000 check to Gioiosa written by Rose's attorney on March 12, 1987 and kept in Rose's accountant's office. Yet, Janszen and Peters recalled the check and stated that it was used by Rose to persuade Peters to resume taking Rose's baseball betting.

- Pete Rose claims the $34,000 check of March 12, 1987 was to pay for gambling losses on the 1987 Super Bowl and the 1987 NCAA Basketball Championship, not the gambling losses to Ron Peters in 1986. But, the NCAA Basketball Tournament had not begun before March 12, 1987.

- Pete Rose denies knowing Ron Peters, the bookmaker from Franklin, Ohio. But, the records of the Cincinnati Reds show tickets for Peters were ordered by Rose in 1986 and 1987. Peters' restaurant, Jonathan's Cafe, exhibits a Rose-endorsed bat.

- Pete Rose admitted that Gioiosa bet for him on other sports activity, not baseball. Gioiosa is under indictment and has been unwilling to talk to us. However, Gioiosa told other people that he bet on baseball for Pete Rose. The telephone toll records of Gold's Gym for 1986, when Gioiosa was manager, also show sixty-five telephone calls to Ron Peters during the 1986 baseball season.

- Rose claimed to have no knowledge of Gioiosa collecting $37,000 in winnings for Pete Rose from Ron Peters at Peters' cafe, but he remembered Gioiosa meeting with Peters in a back room and can remember what he had for lunch.

- Pete Rose said he entrusted Mike Bertolini with hundreds of thousands of dollars because Bertolini was an honest man. However, when Pete Rose heard the unguarded statements by Bertolini on the April 4, 1988 tape, describing the payment of those funds to a New York bookmaker on behalf of Rose, Pete Rose said Bertolini was lying.

- Pete Rose remembered traveling to Ron Peters' Jonathan's Cafe in Franklin, Ohio, with Tommy Gioiosa and giving him an autographed Mizuno bat.

- Pete Rose claimed that he did not know Ron Peters was the bookmaker used by Gioiosa. Ron Peters called for Rose at Reuven Katz's office and received a call back from Robert Pitcairn, who, according to Peters, did no inquire who Peters was and did not dispute Peters' statement that Pete Rose bet with Peters.

- Pete Rose testified that he loaned Paul Janszen $10,000 in March 1988, through his attorney Reuven Katz, for Janszen's legal fees in a criminal case. But Janszen never signed a note. In Janszen's letter to Rose's counsel in 1989, Janszen acknowledged receipt of the $10,000 as partial payment of Rose's debt to him. In response, Rose's counsel did not dispute Janszen's description and did not seek repayment of the $10,000 by Janszen.

- Pete Rose testified that he never owed Paul Janszen $40,000. Rose testified that he never told Janszen to collect from Peters the money Rose owed Janszen. But, Peters testified that Janszen tried to collect the debt from him and Peters gave Janszen the $6,000 difference between what Rose owed Peters and what Peters owed Rose. Rose also told Mark Stowe that he had told Janszen to collect what Rose owed him from some other person. In addition, as noted, Reuven Katz paid Janszen $10,000 on Rose's behalf without receiving a note or demanding repayment.

- Pete Rose testified that he had never placed bets with a person named Val, had never spoken with a person named Val and did not know anyone named Val. Rose stated that he had never received a call from Chevashore seeking payment of monies owed to Val. However, the unguarded statements of Chevashore on December 27, 1988 tape contradict Rose's sworn testimony. Chevashore's statements are corroborated by the baseball betting records in the handwriting of

Rose, Janszen and Marcum, and the telephone traffic for April and May 1987.

- Pete Rose testified that he had not borrowed cash from his friends and associates to pay his gambling losses. He stated under oath that he "owes nobody nothing," and that ne never "stiffed anyone." In contrast, the evidence from 1986 and 1987 reveals loans from Gioiosa to Rose which Gioiosa recovered by keeping the proceeds of a $34,000 check intended for Peters. In addition, the following transactions also reveal Rose's debts: the $7,500 debt to Chevashore and the April 3, 1987 check to cash for $7,500 deposited in New York; the $34,000 debt to Peters and the March 12, 1987 check for $34,000 to Gioiosa; the $44,000 debt to Janszen; the $17,000 and $30,000 debts to Mike Fry; the $8,000 check to Fry of February 5, 1987 and the $13,790 debt to Val; the twenty-nine checks to fictitious payees totalling $227,000 cashed by Bertolini to pay a bookmaker; and the $70,000 debt to Bertolini.

- The evidence revealed that in order to protect his stature as one of the most famous baseball players in Major League history, Pete Rose employed middlemen to place bets for him with bookmakers and at the racetrack and to pay gambling losses and collect gambling winnings, thereby concealing his gambling activity. Rose befriended, entertained, and promoted the businesses of friends and through this arrangement protected his betting from public exposure.

- The evidence revealed Pete Rose generated cash, which is difficult to trace or document, at card shows and through the sale of memorabilia. He cashed checks and arranged for others to cash checks to generate cash to pay his debts. He arranged loans for others who are not credit worthy to generate funds. He wrote checks payable to cash, to a close associate and to fictitious persons for amounts under $10,000 so as to avoid detection by the authorities.

- Pete Rose testified that the very people he carefully chose and cultivated, and who admitted that they had conducted, maintained and protected his betting on Major League baseball and the Reds, could not be believed because they had been caught, convicted and sentenced for various criminal activities during the period of time they were employed, entertained and promoted by Pete Rose.

- Pete Rose thereby avoids any knowledge of the criminal activities or the obvious fruits of criminal activity by Messrs. Gioiosa and Janszen. This is best illustrated in his testimony when he acknowledged he was aware of the inexplicable improvement in the financial condition of Mr. Gioiosa and stated he heard rumors that Gioiosa was involved in cocaine trafficking. Rose stated that although he raised and cared for Gioiosa, he did not inquire about Gioiosa's new found wealth because Gioiosa was not "bothering" him.

- Pete Rose befriended Janszen, a recently retired barrel salesman, who Rose acknowledged had unexplained wealth and who was lowering his public profile. Rose made no inquiry of Janszen about the source of his support and unexplained cash; and yet, promoted his memorabilia business.

- Pete Rose testified that he was ignorant of the activities of his companions. His ignorance of their criminal activities allows Rose to use these young men for his own purposes and if they are caught—claim they are not credible.

- The testimony of Peters, Janszen and Fry has been voluntary and forthright. Each has stood before the bar of justice and engaged in the most painful act of integrity—the admission of guilt to illegal acts. Each is now paying the debt society imposed for his acts against society. None of them has anything to gain for his voluntary act of cooperation with this investigation.

- Pete Rose claimed that Janszen is a blackmailer and is seeking revenge against Rose and, therefore, is not credible. However, you should consider the following:

First, during an initial meeting with the investigators, Paul Janszen voluntarily disclosed his efforts to collect money from Rose.

Second, Janszen provided his correspondence with Rose's counsel evidencing his efforts to collect for Rose. Nowhere in this correspondence is there an attempt at blackmail by Janszen or a claim of blackmail or denial of Rose's debt by Rose's counsel. Indeed, the letter from Janszen's attorney to Rose's counsel specifying the debt has never been answered by Rose or his attorneys.

Third, Janszen told the investigators about Rose's payment of $10,000 for Janszen's attorneys' fees in a criminal case in March 1988. Janszen referred to the $10,000 payment in his letter of January 1989 to Katz demanding payment from Rose.

Fourth, Rose admitted that Janszen was not required to sign a note for the $10,000.

Fifth, nowhere in their correspondence with Janszen's attorney did Rose's attorneys claim that Janszen owed Rose $10,000 or any other money.

Sixth, the claim of blackmail arose after Rose was exposed to the evidence during his deposition on April 20 and 21, 1989.

VIII. ACKNOWLEDGMENT

This assignment has been a special privilege and honor for me, my colleagues and the staff of this firm to serve you, Fay Vincent, and the game of baseball. It has been a particular privilege to serve with Kevin Hallinan and Joe Daly, who are honest men and able professionals who have done you and baseball a great service.

The investigation will continue.

Respectfully submitted,

John M. Dowd

May 9, 1989

COMMENTS

PROFESSIONAL GOODWILL: HOW MISSISSIPPI PRODUCES AN "INEQUITABLE" DISTRIBUTION OF PROPERTY PURSUANT TO DIVORCE BY EXCLUDING PROFESSIONAL GOODWILL*

INTRODUCTION

Since the Mississippi Supreme Court's adoption of equitable distribution in *Ferguson v. Ferguson*,[1] Mississippi courts have divided marital property based upon what is equitable rather than which spouse has legal title.[2] The theory of equitable distribution operates on the premise that marriage is a partnership.[3] Upon divorce, each spouse is entitled to an equitable division of the marital property.[4]

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* Recipient of the 1998-99 Earl T. Thomas Award for Excellence in Writing presented by Alston & Jones Law Firm, Jackson, Mississippi. This award is presented annually to the author of the best comment submitted to the *Mississippi Law Journal*.

[1] 639 So. 2d 921 (Miss. 1994).

[2] Hemsley v. Hemsley, 639 So. 2d 909, 914 (Miss. 1994) (stating that marital assets are subject to equitable division). *See* Parker v. Parker, 641 So. 2d 1133, 1139 (Miss. 1994) (holding that wife was entitled to equitable share of husband's pension plan).

[3] *Ferguson*, 639 So. 2d at 927 n.4. Under the equitable distribution system, the married couple forms a partnership, and each spouse contributes to the accumulation of assets either directly or indirectly. Carmen Valle Patel, Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58

One issue arising under equitable distribution that the Mississippi courts have yet to address is whether the goodwill of a spouse's professional practice should be equitably divided between the divorcing couple.[5] Goodwill is commonly defined as "the value of a business over and above its book value."[6] The value of the goodwill of a professional practice can be very large, and is often the largest asset in the marital estate.[7] Thus, failing to include professional goodwill in the marital estate often results in an extremely "inequitable" division of the former couple's assets.

This comment examines how the Mississippi courts create an "inequitable" division of marital assets by failing to classify professional goodwill as a divisible asset. Part I defines goodwill. Part II outlines how Mississippi and other states have treated commercial goodwill upon divorce. Part III examines how the Mississippi courts have dealt with professional practices upon divorce; further, the section will discuss the various positions that other states have taken as to professional goodwill. Part IV demonstrates why the underlying principles of

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N.Y.U. L. REV. 554, 556 (1983). A spouse could make a direct financial contribution to the partnership, or could make an indirect contribution by being a homemaker. *Id.* The homemaker indirectly contributes to the marriage by allowing the wage earner to concentrate on their career. *Id.* The assets that are accumulated during the marriage accrue to the benefit of both partners. Hunt v. Hunt, 397 N.E.2d 511, 516-17 (Ill. 1979).

[4] *Hemsley*, 639 So. 2d at 914.

[5] Neville v. Neville, 97-CA-00860-COA, 1999 WL 87066, at *3 (Miss. Ct. App. Feb. 23, 1999) (refusing to address issue of whether professional goodwill is marital property).

[6] Elizabeth S. Baker & Shari J. Fein, *Establishing the Existence and Value of Professional Goodwill as a Marital Asset*, 68 FLA B.J. 20, 20 (Feb. 1994).

[7] Patel, *supra* note 3, at 555. For example, in *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972), the goodwill of the husband's medical practice was valued at over $100,000 while the tangible assets were worth approximately $1,000. *Nail*, 486 S.W.2d at 763. In *Ford v. Ford*, 782 P.2d 1304 (Nev. 1989), the goodwill value of husband's medical practice was approximately $100,000 while the tangible assets were worth approximately $80,000. *Ford*, 782 P.2d at 1306. *See* Mueller v. Mueller, 301 P.2d 90, 94-95 (Cal. Ct. App. 1956) (valuing goodwill of husband's dental laboratory business at $25,000); *In re* Marriage of Goger, 557 P.2d 46, 47 (Or. Ct. App. 1976) (valuing goodwill in husband's dental practice at $33,000).

equitable distribution dictate that professional goodwill be classified as a divisible marital asset upon divorce.

I. DEFINITION OF GOODWILL

Businesses consist of both tangible and intangible assets.[8] Goodwill may exist both in professional practices and in commercial businesses.[9] While goodwill is transferable, it may not be transferred independent of the business to which it attaches.[10]

On the issue of professional goodwill, courts have created a tremendous amount of confusion by their failing to consistently agree on a definition.[11] Some courts have narrowly defined goodwill as "[t]he probability that the old customers will resort to the old place."[12] Other courts have broadly defined goodwill as "the advantage acquired by an establishment, beyond the value of property or funds, resulting from any factors contributing to the reputation of the business and public patronage."[13] The advantage may be composed of: "common celebrity, reputation for skill, or affluence, punctuality, and other accidental circumstances or necessities, or even from ancient partialities or prejudices."[14]

Courts, along with the accounting and economic communities, have traditionally found goodwill to exist only when attached to a business, independent of any particular individual.[15] When continued public patronage was dependent on the skills of a particular individual, the courts held that it was due to personal reputation, not goodwill.[16] Generally this does not affect commercial businesses.[17] However, the continued public patronage of a professional practice is due to a mixture of goodwill and personal reputation.[18] Furthermore, continued public patronage of small professional practices is due almost entirely to personal reputation.[19] As a result, many courts have equitably divided commercial goodwill, but have refused to equitably divide professional goodwill.[20] In response to this inconsistency, many of the courts that equitably divide professional goodwill have either explicitly or implicitly expanded the definition of goodwill to include personal reputation.[21]

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[8] Baker & Fein, *supra* note 6, at 20.

[9] *Id.*

[10] *Id.*

[11] Allen Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 FAM. L.Q. 213, 216 (1984) (arguing that courts have created confusion by expanding definition of goodwill beyond its meaning in accounting and economics). *See infra* notes 32-36 and accompanying text.

[12] Dodson v. McElreath, 48 So. 2d 861, 864 (Miss. 1950).

[13] *Dodson*, 48 So. 2d at 864.

[14] *Id.*

[15] Taylor v. Taylor, 386 N.W.2d 851, 858-59 (Neb. 1986) (holding that for goodwill to be divisible it must be business asset with value independent of the reputation of particular individual). *See* Parkman, *supra* note 11, at 213-215 (discussing accounting and economic definitions of goodwill).

II. COMMERCIAL GOODWILL AS A DIVISIBLE ASSET

Consistent with the partnership theory of marriage, virtually all community property and equitable distribution states classify commercial goodwill as marital property subject to an equitable division upon divorce.[22] These courts have recognized that they would be defying basic economic principles if they refused to include goodwill in the marital estate, when the owning spouse could realize the goodwill value through a sale of the business.[23] Even if the owning spouse did not immediately realize the goodwill value through a sale, courts have included it in the marital estate if goodwill was proven to exist.[24]

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[16] *Taylor*, 386 N.W.2d at 858-59.

[17] Patel, *supra* note 3, at 561 (stating that net worth of commercial businesses normally includes any existing goodwill).

[18] *Id.* at 564-65. For example, in a large medical clinic some clients may frequent the clinic because of the skills of a particular doctor, but some may frequent the clinic, not because of an individual doctor, but because of the generally good reputation of the clinic itself.

[19] Hanson v. Hanson, 738 S.W.2d 429, 435 (Mo. 1987). Normally the reliance by patients/clients on reputation decreases with the number of professionals in the practice. *Hanson*, 738 S.W.2d at 435.

[20] *See infra* notes 22, 35, 48-50 and accompanying text.

[21] *See infra* note 70 and accompanying text.

[22] *See* Nicholson v. Nicholson, 669 S.W.2d 514, 516 (Ark. Ct. App. 1984) (holding that business was divisible marital asset even though value of business consisted entirely of goodwill); Finch v. Finch, 825 S.W.2d 218, 224 (Tex. Ct. App. 1992) (holding that goodwill was divisible where it attached to business itself and existed apart from owner's reputation).

[23] BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 6.221 at 423 (2d

The Mississippi Supreme Court and Court of Appeals have never formally stated that commercial goodwill should be classified as a divisible asset. However, several of their decisions have indicated that Mississippi does recognize commercial goodwill as a divisible asset.[25] For example, in *MacDonald v. MacDonald*,[26] the chancellor granted Ms. MacDonald an equitable division of her husband's pawn shop by awarding her $120,000 in lump sum alimony.[27] The Mississippi Supreme Court affirmed this award even though the

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ed. 1994).

[24] *See* Thompson v. Thompson, 576 So. 2d 267, 270 (Fla. 1991) (holding that goodwill is divisible as long as reasonable and reliable basis exists for expert to estimate fair market value); *Hanson*, 738 S.W.2d at 435 (holding that goodwill is divisible when fair market is established by proof of recent comparable sales).

[25] In *Brooks v. Brooks,* 652 So. 2d 1113 (Miss. 1995), the chancery court granted Mrs. Brooks 50% of her husband's interest in a dry cleaning business. *Brooks*, 652 So. 2d at 1121. The supreme court reversed and remanded because the property division and alimony awarded to Mrs. Brooks were overgenerous; however, the court did not indicate that the chancellor erred by granting Mrs. Brooks an equitable interest in the dry cleaning business. *Id.* at 1121-24. In *Waring v. Waring*, 722 So. 2d 723 (Miss. Ct. App. 1998), the court of appeals held that the chancery court erred when it failed to consider Mr. Waring's business holdings when it made an equitable division of the marital assets. *Waring*, 722 So. 2d at 726-28. The court stated that on remand it would be permissible for the chancellor to award Mrs. Waring an in-kind distribution of Mr. Waring's business holdings. *Id.* at 727. *See* Martin v. Martin, 566 So. 2d 704, 706-08 (Miss. 1990) (granting husband and wife opportunity to buy out each other's interest or to sell business and divide proceeds equally); Clark v. Clark, 293 So. 2d 447, 449 (Miss. 1974) (holding where wife contributed to business by working in it, as well as being housewife, chancellor had discretion to award lump sum alimony based on her share in business' assets). By approving an award of a portion of the market value of these businesses to the nonowning spouses, the Mississippi courts appear to have implicitly recognized that commercial goodwill is a divisible marital asset. *See also* Neville v. Neville, 97-CA-00860-COA, 1999 WL 87066, at *3 (Miss. Ct. App. Feb. 23, 1999) (questioning whether, upon divorce, professional practice should be evaluated as on-going business indistinguishable from hardware store).

[26] 698 So. 2d 1079 (Miss. 1997).

[27] *MacDonald*, 698 So. 2d at 1082.

tangible assets of the business were only worth $87,000.[28] The court noted that $87,000 represented the net worth of the store, not its fair market value.[29] By granting the wife an equitable portion of the business, beyond its tangible assets, the court implicitly awarded her a portion of the business' goodwill.[30] While Mississippi Supreme Court and Court of Appeals decisions have indicated that commercial goodwill is a divisible marital asset in Mississippi, the courts need to affirmatively establish that commercial goodwill is a divisible asset in order to prevent confusion among practitioners and chancellors in Mississippi.

III. JUDICIAL TREATMENT OF PROFESSIONAL GOODWILL

All jurisdictions have agreed that the tangible assets of a professional practice are divisible marital assets.[31] However, the issue of whether to equitably divide professional goodwill upon divorce has perplexed courts and family law practitioners nationwide.[32] The confusion has led to differing opinions on how professional goodwill should be treated upon divorce.[33] The current trend is to treat professional goodwill as a divisible asset.[34] However, many states have either refused to classify professional goodwill as a divisible asset,[35] or have only classified it as a divisible asset under certain circumstances.[36]

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[28] *Id.* at 1086.

[29] *Id.* The expert testified that the value of the business, after its assets were subtracted from its liabilities, was $87,000. *Id.*

[30] Goodwill equals the value of a business above and beyond the value of its tangible assets. Hanson v. Hanson, 738 S.W.2d 429, 434 (Mo. 1987).

[31] TURNER, *supra* note 23, at 422.

[32] Parkman, *supra* note 11, at 213 (stating that professional goodwill has been area of confusion for courts).

[33] TURNER, supra note 23, at 425-26.

[34] *Id.* at 426 (stating that large number of states have not placed any restrictions upon divisibility of professional goodwill). *See In re* Marriage of Bookout, 833 P.2d 800, 805 (Colo. Ct. App. 1991) (awarding wife equitable portion of goodwill in husband's solo physical therapy practice); Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983) (holding that goodwill in solo legal practice is property subject to equitable division); Elkus v. Elkus, 169 A.2d 134, 140 (N.Y. App. Div. 1991) (holding that husband's celebrity goodwill was marital property subject to equitable division); Russell v. Russell, 399 S.E.2d 166, 168-69 (Va. Ct. App. 1990) (holding that refusing to equitably divide professional goodwill would "result in a windfall to the professional spouse").

Part A of this section will discuss judicial treatment of professional goodwill in Mississippi. Part B will discuss the reasoning of the courts that treat professional goodwill as a nondivisible asset. Part C will discuss the reasoning of the courts that have placed no restrictions on the divisibility of professional goodwill.

A. *Judicial Treatment of Professional Goodwill in Mississippi*

The Mississippi Supreme Court has not addressed the issue of the divisibility of professional goodwill upon divorce.[37] However, in *Neville v. Neville*,[38] the Mississippi

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[35] TURNER, *supra* note 23, at 425. *See In re* Marriage of Bethke, 484 N.W.2d 604, 607-08 (Iowa Ct. App. 1992) (holding that professional goodwill is factor that should be considered in setting alimony but should not be classified as marital asset); Powell v. Powell, 648 P.2d 218, 223-24 (Kan. 1982) (holding that husband's medical practice was not asset subject to division); Pearce v. Pearce, 482 So. 2d 108, 111 (La. Ct. App. 1986) (holding that goodwill of solo medical practice was not divisible asset).

[36] Some states have taken the position that professional goodwill is not divisible unless it can be distinguished from the professional's personal reputation. *See* Wilson v. Wilson, 741 S.W.2d 640, 647 (Ark. 1987) (holding that wife must prove marketability of goodwill to establish goodwill as divisible asset); Thompson v. Thompson, 576 So. 2d 267, 270 (Fla. 1991) (holding that for law practice to have divisible goodwill it must have "monetary value that exceeds tangible assets, separate from reputation of individual attorney"); Taylor v. Taylor, 386 N.W.2d 851, 858-59 (Neb. 1986) (holding that for goodwill to be divisible asset it must "be a business asset with value independent of the presence or reputation of a particular individual").

[37] Justice Lee recognized, in his dissent in *Ferguson*, that the adoption of equitable distribution may result in the division of professional practices when he stated that: "[t]he majority's proposal would affect the ownership of the doctors' medical practice, the attorneys' law practice, [and] the accountant's accounting practice. . . . " Ferguson v. Ferguson, 639 So. 2d 921, 941-42 (Miss. 1994) (Lee, J., dissenting). *See* Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115, 173 (1997). Justice McRae, in his dissent in *Ferguson*, also briefly addressed the issue of goodwill. *Ferguson*, 639 So. 2d at 945-46 (McRae, J., dissenting) (questioning whether goodwill will be taken into consideration in determining the assets of a business).

[38] 97-CA-00860-COA, 1999 WL 87066, at *1 (Miss. Ct. App. Feb. 23, 1999).

Court of Appeals addressed this issue.[39] The court recognized that Mr. Neville was entitled to some compensation for his contributions to the advancement of Dr. Neville's future earning capacity,[40] but the court refused to address the issue of whether Mr. Neville was entitled to an equitable share of the goodwill.[41] The court stated that it was unnecessary to address the issue because Mr. Neville could be adequately compensated through an award of lump sum alimony.[42] Therefore, the issue remains undecided in Mississippi.[43]

B. Professional Goodwill as a Nondivisible Asset

A minority of courts have held that professional goodwill cannot be equitably divided upon divorce.[44] These courts have offered a number of arguments against the divisibility of professional goodwill, but most of them have hinged on the fact that the goodwill could not be realized through a sale.[45] Most have allowed the division of professional goodwill when the goodwill value could have been realized through an immediate sale.[46] Yet, some courts have indicated that they will never allow the equitable division of a professional practice.[47]

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[39] *Neville*, 1999 WL 87066, at *3. Mr. Neville also requested an equitable division of Dr. Neville's medical degree. *Id.*

[40] *Id.* Mr. Neville was the primary financier of Dr. Neville's professional education, and continued to work after she began her career. *Id.* at *1, *4.

[41] *Id.* at *3.

[42] *Id.* The court stated that they were making the alimony award more generous than they otherwise would in order to account for the contributions. *Id.* The court made no attempt to value Dr. Neville's practice so it is unclear whether Mr. Neville received compensation for any of the goodwill of the practice. *Id.* at *3-*4.

[43] In *Neville*, the Mississippi Court of Appeals indicated that, if presented with the issue in the future, they would place some limitations on the divisibility of professional goodwill. *Id.* at *3. The court stated that it appeared problematic to evaluate "a professional practice as an on-going business indistinguishable from a hardware store. . . . " *Id.*

[44] *See supra* note 35 and accompanying text.

[45] TURNER, supra note 23, at 424-32. *See* Wilson v. Wilson, 741 S.W.2d 640, 647 (Ark. 1987) (holding that for goodwill to be divisible it must be capable of being "sold, transferred, conveyed or pledged"); Holbrook v. Holbrook, 309 N.W.2d 343, 354-55 (Wis. Ct. App. 1981) (holding that goodwill did not have salable value and therefore was not property).

[46] *See* Eslami v. Eslami, 591 A.2d 411, 418 (Conn. 1991) (holding that good-

Many courts have argued that the goodwill is not divisible because it is indistinguishable from the professional's personal reputation.[48] These courts assert that the goodwill consists completely of the individual skills and abilities of the professional.[49] Therefore, the goodwill is completely dependent on the existence of the professional, and when the professional dies, retires, or relocates the goodwill goes with the individual.[50]

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will is divisible where practice is salable and where market exists for its purchase); Hollander v. Hollander, 597 A.2d 1012, 1018 (Md. Ct. Spec. App. 1991) (holding that goodwill of solo dental practice was divisible because goodwill value could be realized through sale); Hanson v. Hanson, 738 S.W.2d 429, 435 (Mo. 1987) (holding that evidence of recent comparable sale was sufficient to establish existence of divisible goodwill). This approach still operates to bar the divisibility of goodwill in many professional practices because some professions are ethically restricted from selling their practices. TURNER, *supra* note 23, at 424.

[47] *See In re* Marriage of Bethke, 484 N.W.2d 604, 607-08 (Iowa Ct. App. 1992) (holding that professional goodwill is factor that bears on future earnings but is not marital property); *In re* Marriage of Hogeland, 448 N.W.2d 678, 681 (Iowa Ct. App. 1989) (holding that professional goodwill is factor that should be considered in setting maintenance); Powell v. Powell, 648 P.2d 218, 223-24 (Kan. 1982) (holding that husband's medical practice was not asset subject to division); Pearce v. Pearce, 482 So. 2d 108, 111 (La. Ct. App. 1986) (holding that goodwill of solo medical practice was not divisible asset).

[48] *See* Young v. Young, 600 So. 2d 1140, 1142 (Fla. Ct. App. 1992) (holding that goodwill of medical practice was not divisible where there was no evidence that it existed separate from husband's personal reputation); Taylor v. Taylor, 386 N.W.2d 851, 859 (Neb. 1986) (holding goodwill not divisible where it is not distinguishable from personal reputation); Beasley v. Beasley, 518 A.2d 545, 552-53 (Pa. Super. Ct. 1986) (excluding goodwill of sole proprietorship from marital assets because it completely consisted of professional's reputation). Most of these jurisdictions allow division of professional goodwill, if it is proven to be distinguishable from personal reputation, through establishing salability or through some other reliable method. *See infra* notes 73-74 and accompanying text.

[49] Nail v. Nail, 486 S.W.2d 761, 763-64 (Tex. 1972). In *Nail*, the court held that no goodwill could have accrued in Dr. Nail's practice because it did not possess value apart from his individual skill. *Nail*, 486 S.W.2d at 764. The court stated that "professional good will is not so much fixed or as localized as the good will of a trade, and attaches to the person of the professional man or woman as a result of confidence in his or her skill or ability." *Id.* at 763.

[50] *Beasley*, 518 A.2d at 552. In *Beasley*, the court distinguished sole proprietorships from partnerships or professional corporations. *Id.* The court reasoned that value can be ascribed to a partnership or corporation, separate from the individual, "for the purpose of buying into or withdrawing from the relationship." *Id.*

The remaining arguments that courts have used to exclude professional goodwill are based on the close relationship between goodwill and the professional's future earnings.[51] Some courts have held that dividing goodwill would be equivalent to dividing the professional's future earnings.[52] These courts have argued that goodwill should simply be a factor considered in determining maintenance.[53] Similarly, other courts have held that equitably dividing goodwill results in a "double counting" because future earnings are already considered in determining maintenance.[54] In addition, courts have held that since goodwill is so closely related to future earning capacity its value is speculative, and equitably dividing it would be the equivalent of recognizing degrees and licenses as marital property.[55]

However, when a sole proprietorship terminates, "the lights go out, the value of the sole proprietorship is extinguished and non-transferable. . . . " *Id.* In *Powell*, 648 P.2d at 223-24, the court held that there was no goodwill in the husband's medical practice. *Id.* at 223. The court reasoned the "nature of a professional practice is that it is totally dependent upon the professional." *Id.* The court noted that when the professional terminates the practice, the client information is of no use to others. *Id. See In re Marriage of Hogeland*, 448 N.W.2d at 681 (stating that goodwill is dependent on professional's ability to continue in practice).

[51] TURNER, *supra* note 23, at 428-32.

[52] *See Beasley*, 518 A.2d at 553 (stating that goodwill "of a sole proprietorship is related only to his future earnings, since an actual sale produces no value"); Holbrook v. Holbrook, 309 N.W.2d 343, 354 (Wis. Ct. App. 1981) (stating that professional goodwill is indistinguishable from professional's future earnings).

[53] *Beasley*, 518 A.2d at 553. The court argued that an equitable division of professional goodwill would operate to punish the professional spouse because it does not contain the flexibility that alimony does. *Id. See In re* Marriage of Bethke, 484 N.W.2d 604, 607-08 (Iowa Ct. App. 1992) (holding that goodwill was factor bearing on earning potential and in determining alimony).

[54] *Beasley*, 518 A.2d at 553. The court reasoned that equitably dividing professional goodwill would be equivalent to awarding lump sum alimony because it is based on future earnings. *Id.* The court stated that if an award of alimony is made then there has been a "double charge on the future income of the paying spouse." *Id.* In *Holbrook*, the court stated that to equitably divide the goodwill of a law practice, and to award alimony, would "constitute a double counting." *Holbrook*, 309 N.W.2d at 352.

[55] *Id.* at 350-51. A majority of jurisdictions do not classify professional degrees and licenses as marital property. Whitney L. White, Note, *Diploma Dilemma: The Possibility of Double Recovery From Multiple Awards of the Licensed Spouse's Future Earning Capacity*, 35 U. LOUISVILLE J. FAM. L. 393, 394 (1997).

C. Professional Goodwill as a Divisible Asset

A majority of courts have equitably divided professional goodwill upon divorce.[56] The trend among these courts is to recognize professional goodwill as a marital asset under all circumstances.[57] However, a number of courts have taken a middle ground approach, and have equitably divided professional goodwill only when it is proven to be separate from personal reputation.[58]

These courts have argued that goodwill is an asset that is distinct from future earnings,[59] and have asserted that goodwill supplements the professional's earning capacity.[60] Moreover, these courts have asserted that future earnings "are simply a factor which are considered to decide if goodwill exists."[61] For example, in *Dugan v. Dugan*, the New Jersey Supreme Court held that "future earning capacity per se is not goodwill."[62] The court reasoned that goodwill is a separate asset because it enhances future earning capacity.[63] The court asserted that goodwill "reflects not simply a possibility of future earnings, but a probability based on existing circumstances."[64]

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[56] *See supra* notes 34, 36 and accompanying text.

[57] *See supra* note 34 and accompanying text.

[58] *See supra* note 36 and accompanying text.

[59] *In re* Marriage of Bookout, 833 P.2d 800, 805 (Colo. Ct. App. 1991). *See* Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983) (stating that goodwill should be differentiated from future earning capacity); Kahn v. Kahn, 536 N.E.2d 678, 681 (Ohio Ct. App. 1987) (holding that goodwill goes beyond future earning capacity); *In re* Marriage of Hall, 692 P.2d 175, 178 (Wash. 1984) (holding that goodwill is "a distinct asset of a professional practice").

[60] *In re Marriage of Bookout*, 833 P.2d at 805. *See In re Marriage of Hall*, 692 P.2d at 178 (stating that "[g]oodwill is a property or asset which usually supplements the earning capacity of another asset, a business or a profession").

[61] *In re Marriage of Bookout*, 833 P.2d at 804.

[62] *Dugan*, 457 A.2d at 6. In *In re Marriage of Hall*, the husband and wife were both medical doctors. *In re Marriage of Hall*, 692 P.2d at 176. The husband had a private practice and the wife was a salaried professor. *Id.* The husband argued that the trial court erred in finding that his practice had $70,000 in goodwill, and that his wife had no goodwill. *Id.* at 176, 178. The Washington Supreme Court held that a salaried employee cannot have goodwill. *Id.* at 178. In making this ruling, the court distinguished between professional goodwill and personal earning capacity. *Id.* The court reasoned that when a professional dies, their earning capacity also dies, but the goodwill that attached to the practice may continue "in the form of established patients or clients, referrals, trade name, location, and associations which now attach to former partners or buyers of the practice." *Id.* However, when a salaried professional leaves they take everything with them. *Id.* Therefore, "[t]here is nothing that increased his earning capacity in the

The courts that have taken the liberal approach to divisibility have divided goodwill despite its lack of marketability.[65] These courts have realized that some goodwill may attach to a practice even if the practitioner is unable to or restricted from selling it.[66] For example, in a large law firm, goodwill is not going to be dependent on any one practitioner.[67] Clients will be attracted to the firm because of the firm's general reputation for high quality service, not because of an individual practitioner.[68] Thus, the goodwill does not flow solely from a practitioner's personal reputation.

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old salaried position that cannot be taken to the new position. *Id.*

[63] *Dugan*, 457 A.2d at 6. The court asserted that when a professional begins their career they have an earning capacity but no goodwill. *Id.* Once their practice is established, their goodwill begins to build and in turn their earning capacity is enhanced. *Id.* This makes goodwill an asset that has value separate from earning capacity. *Id.*

[64] *Id.* The court distinguished earnings enhanced by goodwill from earnings enhanced by licenses or degrees. *Id.* The future earnings enhanced by licenses and degrees are too speculative to be considered property. *Id.* However, goodwill creates a probability of enhanced future earnings, and are thereby not speculative. *Id.*

[65] Ford v. Ford, 782 P.2d 1304, 1309 (Nev. 1989). *See Dugan*, 457 A.2d at 6 (holding that goodwill and its value were not eliminated by inability to sell); *In re* Marriage of Fleege, 588 P.2d 1136, 1138 (Wash. 1979) (holding that goodwill exists regardless of ability to sell).

[66] Prahinski v. Prahinski, 540 A.2d 833, 841 (Md. Ct. Spec. App. 1988).

[67] Parkman, *supra* note 11, at 219.

[68] *Id.* Law firms transfer goodwill when they admit new partners and allow them to use the firm name. Diane Green Smith, Note, *'Til Success Do Us Part: How Illinois Promotes Inequities in Property Distribution Pursuant to Divorce by Excluding Professional Goodwill*, 26 J. MARSHALL L. REV. 147, 170-71 (1992). The fact that law firms require new partners to buy into the partnership indicates that the firm has goodwill that attaches to the firm itself. *Id.* at 171.

In *Nehorayoff v. Nehorayoff*, the court held that the medical clinic where the husband was employed had goodwill value separate from his personal reputation. Nehorayoff v. Nehorayoff, 437 N.Y.S.2d 584, 591 (N.Y. Sup. Ct. 1981). The court reasoned that the patient seeks out the clinic because of advertising, reputation, or referral, not the because of the skills of the individual physician. *Nehorayoff*, 437 N.Y.S.2d at 591.

In addition, these courts have reasoned that a practitioner's inability to sell the practice does not eliminate the value that the goodwill has.[69] Thus, under the partnership theory of marriage, it would be inequitable to deny spouses who contributed to the building of this value their rightful share of it, and would result in a windfall to the professional spouse.[70] In taking this approach, these courts have implicitly stated that they consider goodwill, which flows from the professional's personal reputation, to be a marital asset subject to equitable division.[71]

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[69] *In re Marriage of Fleege*, 588 P.2d at 1138.

[70] *Dugan*, 457 A.2d at 6. The court noted that equitable distribution does not require the transfer of marital assets. *Id.* The wife is entitled to compensation for her contributions just as she would be if a marketable business or professional practice were involved. *Id.* at 7. In *Mitchell v. Mitchell*, the court compared this situation to that of a silent partner withdrawing from a going business. Mitchell v. Mitchell, 732 P.2d 208, 211 (Ariz. 1987). The court reasoned that regardless of the business form, the withdrawing partner would be entitled to compensation. *Mitchell*, 732 P.2d at 211. Thus, the business form should not defeat the wife's interest in the professional goodwill. *Id. See* Russell v. Russell, 399 S.E.2d 166, 168-69 (Va. Ct. App. 1990) (holding that to deny nonowning spouse equitable division "would result in windfall to professional spouse").

[71] What the courts in New Jersey and New York have done is an extreme example of this. In *Piscopo v. Piscopo*, the Superior Court of New Jersey held that the celebrity goodwill of the husband was a divisible marital asset. Piscopo v. Piscopo, 557 A.2d 1040, 1041-43 (N.J. Super. Ct. App. Div. 1989). The court acknowledged that the goodwill was nontransferable and completely dependent on the husband's skills, but held that under *Dugan* all that mattered was whether the goodwill had value to the husband. *Piscopo*, 557 A.2d at 1041. In *Elkus v. Elkus*, the First Appellate Division of the New York Supreme Court held that the celebrity goodwill of an opera singer was a divisible asset. Elkus v. Elkus, 169 A.D.2d 134, 140 (N.Y. App. Div. 1991). The court stated that the personal skills of anyone whose skills "has enabled [them] to become an exceptional wage earner should be valued as marital property subject to equitable distribution." *Elkus*, 169 A.D.2d at 138. The court held that as long as the nonowning spouse contributed to the increase in value, the "appreciation was a product of the marital partnership, and, therefore, marital property subject to equitable distribution." *Id.* at 135. The court found that the expansive definition the legislature gave to marital property was intended to give effect to the partnership theory of marriage. *Id.* at 136.

These courts have expanded the traditional definition of goodwill to include personal reputation. *See* Parkman, *supra* note 11, at 216-21. For example, in valuing goodwill, Washington considers such personal factors as "the practitioner's age, health, past demonstrated earning power, [and] professional reputation in the

In contrast, the courts that have taken the middle ground approach refuse to equitably divide professional goodwill unless there is proof that it exists apart from the professional's personal reputation.[72] Missouri has taken a strict approach, requiring either proof of an offer to purchase or of actual comparable sales.[73] Thus, Missouri's approach completely excludes legal practices from equitable division because of the ethical restrictions on such sales. However, most courts do not require proof of actual comparable sales, and will allow any proof of fair market value that is formed through the use of a reliable and reasonable method.[74] But this approach excludes solo legal practitioners because of the complete unmarketability of their goodwill.[75]

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community as to his judgments, skill, [and] knowledge." *In re Marriage of Hall*, 692 P.2d at 179. The courts have begun to rely less on the economic principles that underlie goodwill for justification, and more on the principles that underlie the partnership theory of marriage. *See Dugan*, 457 A.2d at 6 (arguing that it would be inequitable to deny wife portion of goodwill even though husband was incapable of transferring solo legal practice); Parkman, *supra* note 11, at 217-21 (discussing "[t]he shift to reputation as goodwill").

[72] *See supra* note 36 and accompanying text. These states follow the economic definition of goodwill, and do not follow the expansive definition that has been adopted by the more liberal jurisdictions. *See supra* note 71 and accompanying text; Parkman, *supra* note 11, at 214. Under this definition, goodwill is viewed as an asset of the business or practice, not the individual. *See supra* note 36 and accompanying text.

[73] Hanson v. Hanson, 738 S.W.2d 429, 435 (Mo. 1987). Missouri will also allow expert testimony from other members of the profession "as to the existence of goodwill in a similar practice in the relevant geographic and professional market." *Hanson*, 738 S.W.2d at 435. *See* Gerard v. Gerard, 825 S.W.2d 21, 23-24 (Mo. Ct. App. 1992) (holding that goodwill was not divisible where there was no evidence of comparable sales in relevant market). This approach has not been followed by any other states and has been widely criticized. TURNER, *supra* note 23, at 428 (stating that this is unwise minority position that other states should not follow).

[74] Thompson v. Thompson, 576 So. 2d 267, 270 (Fla. 1991). In *Thompson*, the court held that any expert opinion establishing market value would be acceptable as long as a reasonable and reliable basis exists for it. *Thompson*, 576 So. 2d at 270. In *Eslami v. Eslami*, the Connecticut Supreme Court held that "evidence of comparable sales would ordinarily be more persuasive," but that it was not the only acceptable method of valuation. Eslami v. Eslami, 591 A.2d 411, 419 (Conn. 1991). *See* Taylor v. Taylor, 386 N.W.2d 851, 858 (Neb. 1986).

[75] Hollander v. Hollander, 597 A.2d 1012, 1016 (Md. Ct. Spec. App. 1991).

IV. MISSISSIPPI SHOULD EQUITABLY DIVIDE PROFESSIONAL GOODWILL UPON DIVORCE

Under Mississippi's equitable distribution system, the courts are charged with fashioning an equitable division of *all property* acquired during the marriage.[76] The court intended for the definition of marital property to be construed liberally, as evidenced by its creation of a presumption that all assets are marital property.[77] In addition, for many years Mississippi has treated goodwill as property in other settings,[78] and has implicitly divided commercial goodwill between divorcing spouses, since the adoption of equitable distribution.[79] Furthermore, the vast majority of equitable distribution and community property states have recognized professional goodwill as marital property in not all, but in most, settings.[80] Thus, the complete failure to equitably divide professional goodwill stands in opposition to the spirit of Mississippi's equitable distribution system, to Mississippi's past treatment of goodwill, and to the vast majority of case law in other jurisdictions that adhere to an equitable distribution system.

Moreover, the arguments espoused against equitable division are not convincing enough, especially under the partnership theory of marriage, to deprive a contributing spouse of their rightful share in an asset that was acquired during the marital partnership. First, courts that have refused to equitably divide goodwill because it was not immediately realizable

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However, other solo professional practitioners, such as the solo dental practice in *Hollander* may not be excluded as these other professions are not subject to the special considerations of the legal profession. *Id.* at 1019.

[76] Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994) (defining marital property as "all property acquired or accumulated during the marriage").

[77] *Hemsley*, 639 So. 2d at 914. In *O'Brien v. O'Brien*, the New York Court of Appeals stated that New York's definition of marital property, which is virtually identical to Mississippi's, "went beyond traditional property concepts." O'Brien v. O'Brien, 489 N.E.2d 712, 715 (N.Y. 1985). The court held that under this broad definition, professional licenses were marital property. *O'Brien*, 489 N.E.2d at 716.

[78] Dodson v. McElreath, 48 So. 2d 861, 864 (Miss. 1950) (discussing whether transfer of goodwill with business also transferred lease on real property).

[79] *See supra* notes 25-30 and accompanying text.

[80] *See supra* notes 56-75 and accompanying text.

have ignored the fact that the goodwill still has value to the professional.[81] Further, these courts have divided commercial goodwill even though the owner had no plans of ever selling the business.[82] In addition, many of these courts have equitably divided unvested pensions which are completely unrealizable.[83]

Second, equitably dividing goodwill is not equivalent to equitably dividing the professional's future earnings.[84] Goodwill is a separate asset that advances future earning capacity through presently existing factors such as location and reputation.[85] Moreover, Mississippi courts have equitably divided future streams of income in other contexts where marital contributions have enhanced such values.[86] For example, in *Johnson v. Johnson*, the Mississippi Supreme Court held that the husband's retirement benefits were marital property subject to equitable distribution.[87]

Third, since goodwill is a separate asset that is not equivalent to future earnings, it would not be proper to wait until the alimony stage to account for it.[88] Upon divorce, the nonowning spouse's rights in the goodwill become unconditional.[89] However, periodic alimony is not consistent with this unconditionality because it terminates upon death or remarriage and is subject to modification.[90] Further, using alimony would be inconsistent with the supreme court's purpose in adopting equitable distribution. By adopting equitable distribution, the court intended to use equitable distribution as the primary vehicle of property distribution, and to thereby move away from the use of alimony.[91] In addition, using lump sum alimony would not send a clear message to the chancellors that they are to seriously consider the value of professional goodwill when fashioning relief.[92] Also, the potential "double counting" problem could be prevented by clearly instructing chancellors that they are not to consider goodwill when setting maintenance.[93]

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[81] *See supra* notes 69-70 and accompanying text. The professional's failure to immediately realize the goodwill value does not reduce its present value. Patel, *supra* note 3, at 568.

[82] *See supra* notes 22-30 and accompanying text.

[83] TURNER, *supra* note 23, at 428. *See* Bell, *supra* note 37, at 168 (stating that majority of states now equitably divide unvested pensions). The Mississippi courts have not yet considered the issue of whether unvested pensions are divisible marital assets. *Id.*

[84] *See supra* notes 59-64 and accompanying text. Professional goodwill is analogous to stocks and rental property in that they are all unliquidated assets with a present value. Patel, *supra* note 3, at 568. They all produce a current stream of income prior to realization. *Id.* Therefore, professional goodwill should be recognized as a present property interest, like stock and rental property. *Id.*

[85] *In re* Marriage of Hall, 692 P.2d 175, 178 (Wash. 1984).

[86] Pierce v. Pierce, 648 So. 2d 523, 526 (Miss. 1994) (awarding wife 50% of husband's military retirement pay). *See* Parker v. Parker, 641 So. 2d 1133, 1139 (Miss. 1994) (awarding wife 30% of husband's vested profit sharing plan). Goodwill and retirement benefits are both assets that take the form of future streams of income. TURNER, *supra* note 23, at 428.

[87] Johnson v. Johnson, 650 So. 2d 1281, 1286 (Miss. 1994).

[88] TURNER, *supra* note 23, at 430 (arguing that alimony is not sufficient compensation because of its conditional nature).

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[89] *Id.*

[90] Bell, *supra* note 37, at 119-20. The need of the nonprofessional spouse would be one of the major factors considered in setting alimony. *See* Armstrong v. Armstrong, 618 So. 2d 1278, 1280 (Miss. 1993) (listing need as one of factors to be considered in making alimony award). This would operate to punish those nonprofessional spouses who have significant earning capacities and little need. Their lack of need though does not make their contributions to the marital partnership any less significant than the contributions made by a more needy spouse. Even if the nonprofessional spouse is in need, the alimony award can later be reduced because of the post-marital behavior of the nonprofessional spouse. Hammonds v. Hammonds, 641 So. 2d 1211, 1215 (Miss. 1994) (holding that modification or termination is permissible where former spouse is co-habiting). In addition, former spouses may become insolvent, making alimony difficult to collect. Bell, *supra* note 37, at 123 (stating that alimony has been criticized because it carries no guarantee of collection).

[91] Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994). The sixth Ferguson factor orders chancellors to consider "[t]he extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties." *Ferguson*, 639 So. 2d at 928. The court stated that one of the goals of equitable distribution is finalization of "the parties' legal relationship." *Id.* at 929. *See* Smith, *supra* note 68, at 181 (stating that goal of equitable distribution is to end "the relationship so that the parties may begin anew").

[92] *See* TURNER, *supra* note 23, at 431. Refusing to equitably divide goodwill sends a message that goodwill is less important than the other assets. *Id.* Therefore, chancellors are less likely to take goodwill seriously, and are less likely to make an award of lump sum alimony on that basis. *Id.* In addition, since need is also a factor to be considered when awarding lump sum alimony, courts often will not compensate nonprofessional spouses who have high earning capacities. *See* Tilley v. Tilley, 610 So. 2d 348, 351-52 (Miss. 1992) (stating that receiving spouse's lack of financial security is one factor to be considered).

Fourth, equitably dividing goodwill is not the equivalent of equitably dividing degrees and licenses. The likelihood that a degree or license will generate future earnings is speculative and only creates a "possibility of future earnings," but professional goodwill creates a "probability of future earnings."[94]

Finally, the possibility that the goodwill flows from personal reputation, and not business reputation, should not lead to the exclusion of goodwill.[95] To begin with, goodwill may exist apart from the individual even if the practice is completely unmarketable.[96] For instance, if the practice is in an excellent location, chances are that many of the customers would continue to frequent it no matter who the owner is. Also, the clients of large law firms and medical clinics often seek their services, not because of particular individual members of the practice, but because of the general reputation of their practices.

However, even if personal reputation and goodwill do overlap, the principles that underlie equitable distribution dictate that goodwill should be divided anyway.[97] As stated previously, the courts in Mississippi have been charged with equitably dividing all assets which are produced as a result of the marital partnership.[98] If the nonowning spouse contributes to the enhancement of the partner's professional goodwill, then the nonowning spouse is entitled to an equitable share, regardless of whether the goodwill flows from personal reputation or from the reputation of the practice. It is inherently inequitable to discriminate between the spouses of professionals and the spouses of nonprofessionals, as well as to discriminate between the spouse of a doctor and the spouse of an attorney on the grounds that attorneys are ethically prohibited from selling their practices. Thus, in order to avoid conflict with the basic partnership theory of equitable distribution, Mississippi should follow the lead of the jurisdictions that equitably divide professional goodwill under all circumstances.

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[93] *See* TURNER, *supra* note 23, at 431. This concern also applies to commercial goodwill, but no court has ever refused to divide commercial goodwill on this basis. *Id.*

[94] Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983). Licenses and degrees are never transferable, but professional goodwill is transferable in most instances. *Dugan*, 457 A.2d at 6.

[95] *See supra* notes 65-71 and accompanying text. The line drawn between professional and commercial goodwill, which is based on the personal nature of professional goodwill, is not as clear cut as many courts view it to be. Patel, *supra* note 3, at 563-64. The goodwill of highly localized businesses consists largely of the individual skills and reputation of its owner. *Id.* at 564. The goodwill in most commercial businesses depends to some extent on the personal skills of its managers. *Id.*

[96] *See supra* notes 65-68 and accompanying text.

[97] *See supra* notes 69-71 and accompanying text.

In sum, professional goodwill is an asset that should be equitably divided upon divorce. Once the court determines that a professional practice has goodwill, determination of its value should be the only remaining question.[99] If Mississippi courts continue to refuse to divide professional goodwill, then they will continue to produce "inequitable" divisions of marital property.

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[98] Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994)

[99] The method used most often to value professional goodwill is the capitalization of excess earnings approach. Clark v. Clark, 782 S.W.2d 56, 60 (Ky. Ct. App. 1990). The capitalization of excess earnings approach compares the professional's pretax net income for a period of years to what an "attorney of comparable experience, expertise, education and age would be earning as an employee in the same general locale." *Dugan*, 457 A.2d at 9. In comparing the two, one must take into consideration any excess hours worked by the professional. *Id.* If the average of the professional's net income "realistically exceeds the total of (1) the employee norm and (2) a return on the investment in the physical assets," then there is a basis for evaluating goodwill. *Id.* at 9-10. The excess is then multiplied by a capitalization factor. *Id.* at 10. The capitalization factor is calculated by determining "the number of years of excess earnings a purchaser would be willing to pay for in advance in order to acquire the goodwill." *Id.* The precise capitalization factor is determined by looking at other evidence, such as capitalization factors used to measure goodwill in other professions. *Id.* In the case of a legal practice, the capitalization factor would be adjusted to reflect the inability to sell the practice. *Id.*

Some courts have refused to recognize the capitalization of excess earnings approach as a viable valuation method. Hanson v. Hanson, 738 S.W.2d 429, 436 (Mo. 1987). They refuse to allow its use because it places value on goodwill that attaches to the professional's personal reputation. *Hanson*, 738 S.W.2d at 436. These courts require proof of the goodwill's fair market value. *See supra* notes 73-74 and accompanying text.

CONCLUSION

By adopting equitable distribution in 1994, the Mississippi Supreme Court intended to put an end to the inequitable property divisions that occurred under the old title system. However, for those persons whose spouses are professionals, these inequitable property divisions are still occurring.[100] Professional goodwill is usually the largest asset in the marital estate, and refusing to equitably divide it operates to punish spouses who may have sacrificed their own careers so that their spouses could devote their efforts to professional careers. Thus, if the supreme court intends to adhere to the most basic principle of equitable distribution, that spouses are *equal partners* as to property acquired during the marriage, then the court must equitably divide professional goodwill upon divorce.

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[100] In *Kilpatrick v. Kilpatrick*, 97-CA-00550-SCT, 1999 WL 12799 (Miss. Jan. 14, 1999), Mr. Kilpatrick had a thriving legal practice at the time of divorce. *Kilpatrick*, 1999 WL 12799, at *2. Mrs. Kilpatrick almost completely financed Mr. Kilpatrick's legal education and continued to work throughout the majority of the marriage. *Id.* at *2-*3. Mrs. Kilpatrick worked as a speech pathologist in the Neshoba County School District. *Id.* at *3. Mr. Kilpatrick had practiced law in Philadelphia, Mississippi since 1974. *Id.* He had a net income of $848,039 in 1994, while Mrs. Kilpatrick had a net income of $25,759. *Id.* at *5. In 1993, Mr. Kilpatrick had a net income of $389,961, and Mrs. Kilpatrick had a net income of $24,253. *Id.* at *5. The chancellor awarded Mrs. Kilpatrick $35,000 in lump sum alimony, and did not award her any of the practice's potential goodwill value. *Id.* The supreme court reversed and ordered the chancellor to reconsider the award, but did not mention granting Mrs. Kilpatrick an equitable share of the legal practice. *Id.*

In *Russell v. Russell*, 97-CA-00691-COA, 1999 WL 27554 (Miss. Ct. App. Jan. 26, 1999), Dr. and Mrs. Russell were married for approximately fifteen years. *Russell*, 1999 WL 27554, at *1. Mrs. Russell financed Dr. Russell's medical education by working as a nurse. *Id.* During the marriage, Mrs. Russell worked in her husband's medical clinic in a managerial and clerical capacity. *Id.* In 1994, Dr. Russell's medical practice had a gross income of $270,449, while in 1995 it produced a gross income of $327,546. *Id.* The chancery court awarded Mrs. Russell $50,000 in rehabilitative alimony and $5,000 per month in periodic alimony. *Id.* at *2. The court of appeals noted that no attempt was made to value the medical clinic as a going concern. *Id.* at *1. The court of appeals affirmed this award. *Id.* at *3.

In both of these cases, the wives were potentially deprived of their equitable shares of hundreds of thousands of dollars in goodwill value. Mrs. Russell's alimony award was a generous award, but it is subject to termination or modification at any time. *See supra* note 90 and accompanying text.

Scott Singley

AN OUNCE OF PREVENTION WORTH POUNDS OF CURE: DISCLOSURE AND DEFENSE OF RICO CLAIMS IN FORCE-PLACED INSURANCE LITIGATION*

I. INTRODUCTION

Once considered routine in the banking industry,[1] the force-placed insurance practices in consumer financing operations of banks nationwide are under heightened scrutiny by plaintiff's attorneys and bank customers.[2] The lesson for lenders has often been a hard pill to swallow—inadequate disclosure and excessive coverage make the cost of settlement and the probability of an unconscionable jury verdict exceedingly high.[3] Legislative action to corral these unconscionable jury verdicts and put an end to these lawsuits could be forthcoming.[4] Until then, the old saying that an ounce of prevention is worth a pound of cure seemingly holds true: a dollar's worth of disclosure at the time of the loan may be worth millions in settlement alternatives down the road.

Force-placed insurance programs are protection and monitoring mechanisms designed for the benefit of the lender at the expense of the borrower and provided for in the loan contract.[5] In the event that a borrower fails to initially obtain or continually maintain adequate insurance on the lender's security interest for a consumer loan, the lender has a contractual right to secure such insurance on behalf of the borrower and charge the costs of this coverage to the principal balance of the borrower's loan.[6] These collateral protection mechanisms, known as vendor single interest insurance (VSI) or collateral protection insurance (CPI),[7] have become commonplace in contractual agreements in the automobile and home furnishings financing industries—or at least they were until very recently.[8] They have also been used in a limited capacity in other types of consumer loan transactions.[9]

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[1] John M. Flynt, Comment, *A Solution to Force-Placed Insurance Litigation for Lenders: Disclosure and Arbitration*, 26 CUMB. L. REV. 537, 537 (1995-1996). Lenders simply considered force-placed insurance practices part of the everyday business of consumer credit transactions. *Id.*

[2] *Conning the IADC Newsletters*, 63 DEF. COUNS. J. 154, 163 (1996).

[3] *Id.* at 164. Multimillion dollar settlements have been reached involving a growing number of large national banks, including Chase Manhattan Bank, Mellon Bank, Tokai Credit Corporation, BankAmerica, and many others. *Id. See* Martha Brannigan, *Country Justice—Why a Mississippi Jury Found a Small Dispute Worth 38 Million*, WALL ST. J., April 12, 1995, at A1; Jonathan D. Epstein, *$39M Judgment Against Bank in Car Loan Case*, AM. BANK., Jan. 30, 1995.

[4] *At the Capitol*, THE MISS. BANKER, at 8 (January 1998).

Force-placed insurance is a broad term encompassing a host of very different types of collateral insurance and loan repayment insurance. Among these varying types of banking insurance practices are credit life and disability insurance, credit property damage or loss insurance, nonfiling insurance, and involuntary unemployment insurance.[10] Credit life and disability insurance simply provide that in the event that the borrower dies or becomes disabled and is unable to continue making payments of the loan, the insurer will make such payments. Credit property insurance is typical accident and natural disaster insurance obtained by consumers to protect their interest in the property financed. Nonfiling insurance is a newer breed of insurance to most consumers consisting of a small insurance policy taken out by the lender in lieu of passing on a filing fee to the consumer to perfect the lender's security interest in the collateral against subsequent lien holders.[11] Involuntary unemployment interest is just what its name implies—insurance against the inability to make scheduled loan payments due to involuntary unemployment.

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[5] Thomas J. Methvin, *Damages Theories and Trial Strategies*, 990 PRAC. L. INST./CORP. 479, 491 (May 1997). Per the loan agreement, lenders are authorized to purchase collateral insurance on behalf of the borrower for the protection of the lender. *Id.* It is certainly permissible under virtually any interpretation of these loan provisions for the lender to purchase coverage similar to the insurance that a borrower has failed to renew. *Id.* However, the purchase of coverage when the borrower has failed to initially obtain coverage or the purchase of coverage above and beyond that which the borrower has failed to renew, such as default insurance, present different problems. *Id.* A typical policy might read:

> Buyer agrees to keep said motor vehicle fully insured against loss by fire, theft, and collision of the entire term of this contract. . . . In the event of the failure of Buyer to insure said motor vehicle . . . such failure shall constitute an event of default hereunder. Holder shall have the option, but shall not be required, to procure such insurance for Buyer and to advance the premium therefore. Buyer hereby promises to pay any such premium with finance charge thereon at the annual percentage rate stated on the reverse side hereof as an additional indebtedness due hereunder.

Conning the IADC Newsletters, *supra* note 2, at 163.

[6] Methvin, *supra* note 5, at 491. Lenders generally can seek repayment for the premiums paid in one of several manners: billing the borrower directly, increasing the monthly payments due on the note, or accruing a balloon payment due at the termination of the original loan. *Conning the IADC Newsletters*, *supra* note 2, at 163.

[7] Flynt, *supra* note 1, at 539.

[8] *Conning the IADC Newsletters*, *supra* note 2, at 163. CPI lending practices are commonplace in the automobile financing industry. *Id.*

[9] *Id.*

Plaintiffs have filed a multitude of lawsuits in the past ten years, including class actions, against banks and insurance companies for collateral insurance practices. Particular practices which have been the subject of much litigation include charging for types of coverages not authorized by the loan agreement, charging excessive premiums to offset the costs of the CPI program, and arranging for rebates or "kick-backs" with the insurance carrier not passed back to the borrower.[12] The typical complaint lists a multitude of state claims, including breach of contract, breach of fiduciary duties, breach of duty of good faith, and tortious interference with contractual relationships.[13] In addition, numerous federal claims are typically listed in the complaint which generally fall under four principal acts:[14] 1) the National Bank Act,[15] 2) the Anti-Tying Amendments to the Bank Holding Company Act,[16] 3) the Truth In Lending Act (TILA),[17] and 4) the Racketeer Influenced and Corrupt Organizations Act (RICO).[18] This comment will focus on force-placed insurance generally and the successes and failures of defendant banks and insurance companies with RICO claims.

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[10] Gene A. Marsh, *A Practitioner's Guide to the New Alabama Mini-Code*, 48 ALA. L. REV. 957, 998 (1997).

[11] *See infra* Part IV D. *See generally* Jeffrey I. Langer & Kathleen E. Keest, *Interest Rate Regulation Developments in 1995: Continuing Liberalization of State Credit Card Laws and "Non-Filing" Insurance as "Interest" Under State Usury Laws*, 51 BUS. LAW. 887, 894 (1995-1996). Created to protect lenders who intentionally fail to perfect a security interest in collateral by not filing with the appropriate state agency, nonfiling insurance is offered to consumers in lieu of the agency's filing fee. *Id.* Often used as a "vehicle to create a default reserve," many lenders neither perfect their interest through filing nor take out a nonfiling insurance policy, choosing instead to self-insure by retaining the nonfiling premiums. *Id.* The limited risk to which any such policy would be addressed is only triggered by the borrower's default *and* the presence of a subsequent secured creditor. *Id.* Practically speaking, the risk is even narrower than it appears given that this type of insurance is employed almost exclusively with respect to furniture and appliance retail installment sales and loans secured by household goods. *Id.* Purchase money security interests in consumer goods require no filing to perfect the security interest under the UCC. Langer & Keest, *supra*, at 894-95. Household goods are of such little value as collateral that any policy taken out to protect this interest is suspect. *Id.* at 895. *See infra* Part IV D and notes 73-78.

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[12] Michael P. Malakoff & David W. Snyder, *An Update of Force-Placed Insurance Suits*, 990 PRAC. L. INST./CORP. 227, 230 (May 1997). Often, agreements between the lender and insurance carrier include a rebate of excessive commissions to the lender in proportion to the number of policies written by the insurance carrier on borrowers of that particular lender. *Id. See also* Helen W. Leslie and James M. Cain, *Financial Institutions and Insurance in 1995: State Insurance Regulations Assert Authority Over Banks*, 51 BUS. LAW. 909, 923 (1995-1996). In fact, the seminal CPI case to reach a federal appellate court contained allegations of overinsuring and rebate or "kick-back" arrangements. Kenty v. Bank One, 92 F.3d 384, 388 (6th Cir. 1996). The Mississippi Supreme Court has stated that banks may legally charge premiums up to the statutory limit, without subtracting the commissions received from the insurer from the actual cost of the insurance. Tew v. Dixieland Fin., Inc., 527 So. 2d 665, 672 (Miss. 1988).

[13] Malakoff & Snyder, *supra* note 12, at 231. For general discussion of state claims and how plaintiffs have litigated these claims, see *id.* at 231-34.

[14] *Id.* at 231. For general discussion of these claims and how plaintiffs are litigating them, see *id.* at 234-43.

[15] Three federal court cases, brought under the National Bank Act, were recently dismissed by Ohio trial courts. Helen W. Leslie & James M. Cain, *Financial Institutions and Insurance in 1994: Valic becomes Nationwide*, 50 BUS. LAW. 1117, 1132-33 (1995). The Ohio courts have consistently held that the "most favored lender doctrine" and an Ohio statute that regulates interest charged by savings and loan institutions prevent the CPI charges sued upon from being usurious as a matter of law. *Id.* at 1133.

[16] 12 U.S.C. § 1972 (1994 & Supp. II 1996). For more discussion on actions brought under this theory of liability, see Leslie & Cain, *supra* note 15, at 1133.

[17] 15 U.S.C. § 1601-1693 (1994 & Supp. II 1996).

[18] 18 U.S.C. § 1961-1698 (1994 & Supp. II 1996).

II. JUSTIFYING THE LENDERS' FORCE-PLACED INSURANCE PRACTICES GENERALLY

Force-placed insurance practices often seem suspect on their face, and the lingering prospect of jury disapproval is substantial. Thus, it is critical that banks and insurance companies be able to justify these lending practices in order to avoid litigation, make settlement more palatable, and alleviate looming jury suspicions of these lending practices at trial.

Lenders have a legitimate need for the authorized force-placing of collateral protection insurance because lenders typically have more money tied up in the collateral and less control over the collateral than does the borrower.[19] When a borrower fails to secure insurance coverage as required in the loan agreement, the real risk of loss is on the lender.[20]

Force-placed insurance is an effective means of controlling or limiting otherwise uncontrollable risk associated with consumer loans.[21] Post-loan events which increase risk of default can be characterized as exogenous events and debtor misbehavior,[22] known more commonly to the insurance industry as moral hazard.[23] Exogenous events are changes in financial and industrial market conditions which adversely affect the borrower's ability to repay the loan.[24] Debtor misbehavior refers to any action by the borrower making it difficult for the lender to obtain repayment.[25] These problems tend to parallel one another as debtor misbehavior is often the result of the borrower's inability to pay due to exogenous events.[26]

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[19] Alvin C. Harrell, *Forced-Placed Insurance Hits the Spotlight*, 48 CONSUMER FIN. L.Q. REP. 513, 513 (1994).

[20] *Id.* As one commentator noted, "A bank that tolerated this risk would be engaging in a grossly unsafe and unsound practice." *Id.* Thus, the lenders' right to require coverage or obtain it for a borrower who fails to carry such coverage "has long been recognized as customary and necessary." *Id.*

[21] Flynt, *supra* note 1, at 540. CPI programs are a "protective response to the factors that are beyond a lender's control." *Id.* In fact, one commentator has asserted that federal regulators conducting bank examinations criticize banks for failing to force-place insurance when authorized to do so. Carl W. Morgan, *Forced-Placed Insurance*, 49 CONSUMER FIN. L.Q. REP. 124, 127 (1995). Morgan goes on to say that "[f]ew would dispute the right of a lender to protect its collateral through the means provided by collateral protection insurance." *Id.*

[22] Flynt, *supra* note 1, at 540 (citing Daniel R. Fischel, *The Economics of Lender Liability*, 99 YALE L.J. 131, 134 (1989)).

[23] KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 4 (2d ed. 1995). The term "moral hazard" is used generally to refer to the tendency of insured

In assessing appropriate interest rates on these loans, lenders must either raise the interest rate to reflect these risks or charge the borrower to insure against them.[27] In effect, the availability and use by lenders of force-placed insurance products lowers the overall cost of borrowing money for most debtors and makes consumer loans easier to obtain.[28] One commentator has opined that "force-placed insurance programs are not unfair to the borrower" when "operated in good faith and with proper disclosure" due to the lower interest rates which borrowers are able to secure for their consumer credit needs.[29] The availability of alternative forms of financing in the expansive banking industry implies a willingness on the part of the borrower to comply with terms that the borrower considers favorable or beneficial—otherwise, the borrower would simply find another lender whose terms fit the bill.[30] The avoidance of "unfavorable and costly contract terms, such as coercive collection remedies" is accomplished through the somewhat friendlier option of force-placing insur-

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parties to exercise less care than they would have exercised were they uninsured. *Id.* Monitoring mechanisms are the principal way of eliminating moral hazard and assigning risk to parties based on their actual, or insured-specific, level of care rather than that of a general group. *Id.*

[24] Flynt, *supra* note 1, at 540 (citing Fischel, *supra* note 22, at 134).

[25] *Id.*

[26] *Id.* These forms of risk walk hand in hand in that the propensity of debtors to misbehave (in our case, failing to properly insure the collateral) can be a direct result of an inability to perform their contractual duties due to changing market conditions. *Id.* Though not always the case, an inability to pay for insurance often results from post-loan events beyond the control of the borrower. *Id.*

[27] *Id.* at 541.

[28] *Id.*

[29] *Id.*

[30] *Id.*

ance.[31]

III. RICO AND PERTINENT THEORIES OF LIABILITY

State courts in Mississippi have no Rule 23 class action tool.[32] The Mississippi Supreme Court in adopting the Mississippi Rules of Civil Procedure commented that "few procedural devices have been the subject of more widespread criticism and more sustained attack" than has Federal Rule of Civil Procedure 23.[33] Accordingly, plaintiffs in Mississippi have a strong incentive in these types of suits to get their cases into federal court, and RICO is a popular tool utilized to accomplish just that.[34]

The federal Racketeer Influenced and Corrupt Organizations Act imposes both criminal[35] and civil[36] liability on persons engaged in patterns of racketeering activity.[37] RICO liability affecting the lending and insurance practices pertinent to banks is set out in two major subsections of § 1962 of the RICO Act which make it unlawful for any person to reinvest the proceeds of a pattern of racketeering activity into a racketeering enterprise under subsection (a)[38] or to participate di-

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[31] *Id.* at 542.

[32] MISS. R. CIV. P. 23. For a general discussion of the Rule 23 class action application in the Fifth Circuit, see Ross F. Bass, Jr. & John W. Robinson, III, *The Metamorphosis of Mass Tort Class Actions: A Fifth Circuit Perspective*, 17 MISS. C. L. REV. 207, 209 (1997).

[33] MISS. R. CIV. P. 23 cmt.

[34] *Conning the IADC Newsletters, supra* note 2, at 165. For settlement purposes, defendants who are able to keep an individual plaintiff in state court on state theories of liability are in a much stronger settlement position without the looming threat of treble damages and attorneys' fees provided for under civil RICO or the possibility of class certification. *Id.*

[35] 18 U.S.C. § 1963 (Supp. 1998). Criminal punishment may include fines, imprisonment, and forfeiture of any interest attained in property resulting from the violation of section 1962. 18 U.S.C. § 1963.

[36] 18 U.S.C. § 1964 (West 1984 & Supp. 1998). Plaintiffs in civil actions against businesses, legitimate or illegitimate, violating section 1962 can seek treble damages and costs, including reasonable attorneys' fees. 18 U.S.C. § 1964.

[37] 18 U.S.C. § 1961 *et seq.* (West 1984 & Supp. 1998).

[38] 18 U.S.C. § 1962(a) (West 1984). Specifically, the statue reads, in part:

> It shall be unlawful for any person who has received any income de-

rectly or indirectly in the pattern of racketeering activity under subsection (c).[39]

Racketeering is defined in 18 U.S.C. § 1961(1) as, among other things, any violation of 18 U.S.C. § 1341 (mail fraud), 1343 (wire fraud), and 1344 (financial institution fraud).[40] A pattern of racketeering may be established by any two acts of racketeering activity within a ten year period.[41] The definition of enterprise for RICO purposes includes individuals, associations, and other legal entities which would include virtually any business, including banks.[42]

Plaintiffs in force-placed insurance litigation have typically alleged that financial institutions and insurance companies participating in force-placed insurance "schemes" have defrauded consumer borrowers through inadequate disclosure and through the purchase of excessive coverae.[43] This fraud, combined with subsequent mailing of loan documents and telephone calls concerning the loan, is the basis of RICO liabil-

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> rived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, . . . or the activities of which affect, interstate or foreign commerce.

Id.

[39] 18 U.S.C. § 1962(c) (West 1984). Specifically, the statute reads:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.

[40] 18 U.S.C. § 1961(1)(B) (Supp. 1998).

[41] 18 U.S.C. § 1961(5) (West 1994).

[42] 18 U.S.C. § 1961(4) (West 1984).

[43] Jeremy T. Rosenblum, *Recent Developments in Forced-Placed Insurance*, 49 CONSUMER FIN. L. Q. REP. 350, 353 (Fall 1995). Plaintiffs have found RICO to be only "moderately successful" in litigation against banks concerning force-placed insurance practices. *Id. But see* Kenty v. Bank One, 67 F.3d 1257 (6th Cir. 1995) *amended and superseded on reh'g by* Kenty v. Bank One, 92 F.3d 384 (6th Cir. 1996); Bermudez v. First of America Bank-Champion, 860 F. Supp. 580 (N.D. Ill. 1994) *withdrawn pursuant to settlement*, 886 F. Supp. 643 (N.D. Ill. 1995).

ity.[44] Specifically, in force-placed insurance cases, plaintiffs must allege that misrepresentations or omissions regarding the nature of the force-placed insurance procured were reasonably calculated to deceive and that the plaintiff relied on such misrepresentations or omissions.[45]

IV. DEFENSES TO RICO THEORIES OF LIABILITY

The following sections catalogue some of the more successful defenses banks and insurance companies have been able to utilize in defending their force-placed insurance practices against RICO claims.

A. *Invoking the McCarran-Ferguson Act*

Some bank defendants involved in CPI litigation have found invocation of the McCarran-Ferguson Act[46] a successful defense to RICO claims.[47] The McCarran-Ferguson Act makes state law the final authority on regulating the "business of insurance" and grants no leave to federal preemption of state insurance laws.[48] Lenders have employed this act as a defense to most federal theories of liability when their force-placed insurance practices come under attack.[49] The success of this defense has depended largely upon whether the court determines that the particular force-placed insurance practices constitute the "business of insurance."[50] If the court finds that the particular force-placed insurance practice does constitute the business of insurance, then RICO claims and other federal theories of liability such as the Truth In Lending Act[51] would be barred by the McCarran-Ferguson Act under § 1012(b).[52] However, if the court finds that the particular

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[44] 18 U.S.C. § 1962(c). Violations of section 1341 and section 1343, mail and wire fraud, respectively, are the acts of racketeering as defined in section 1961 and form the basis for RICO liability under § 1962(c). 18 U.S.C. § 1962(c). Mail fraud can serve as the predicate act giving rise to RICO liability. Malakoff & Snyder, *supra* note 12, at 242. "Mail fraud requires intentional participation in a scheme to defraud, with a specific intent to defraud and use of the mails in furtherance of that scheme. [citations omitted] A plaintiff must identify with particularity the fraudulent 'scheme to deprive another of money by means of false pretenses, representations, or promises.'" *Id.* [citation omitted]. Of note, a recent federal district court decision held that detrimental reliance is not an element in mail fraud actions. Ruiz v. Stewart Assocs., Inc., 171 F.R.D. 238, 240 (N.D. Ill. 1997).

[45] *Kenty*, 92 F.3d at 390. *See* Malakoff & Snyder, *supra* note 12, at 242.

[46] 15 U.S.C. § 1011-1015 (West 1997).

[47] *Conning the IADC Newsletters, supra* note 2, at 164. Plaintiffs seeking to get their claims into federal court under RICO and/or TILA must first get by the McCarran-Ferguson Act hurdle. *Id. See also* Morgan, *supra* note 21, at 125-26 (stating that "first line of defense" for defendants wishing to stay in state court is preemption from RICO under McCarran-Ferguson act).

[48] 15 U.S.C. § 1012 (West 1997). Subsection (a) specifically provides that the "business of insurance" is subject to state regulation and taxation. 15 U.S.C. § 1012(a). Subsection (b) bars federal preemption of state regulation regarding the "business of insurance," excepting the Sherman and Clayton Acts (regarding anti-

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trust). 15 U.S.C. § 1012(b). Congress declares in section 1011 that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (West 1997). *See generally Conning the IADC Newsletters, supra* note 2, at 164 (stating that section 1012(b) leaves the regulation of "business of insurance" to individual states).

Although the McCarran-Ferguson Act was enacted in response to a decision involving antitrust law, the Fifth Circuit has specifically made it clear that the Act's breadth extends well beyond the antitrust arena. Cochran v. Paco, Inc., 606 F.2d 460, 463 (5th Cir. 1979). The Act is intended to return to the states "the plenary power to regulate the business of insurance" taken from the states through federal case law. *Cochran*, 606 F.2d at 463.

[49] *Conning the IADC Newsletters, supra* note 2, at 164.

[50] *Id.*

[51] *See supra* note 17 and accompanying text.

[52] *See* Gordon v. Ford Motor Credit Co., 868 F. Supp. 1191, 1192 (N.D. Cal. 1992). The United States District Court for the Northern District of California specifically provided that the McCarran-Ferguson Act exemption could extend to noninsurer entities, such as an automobile finance company, and bars RICO claims against such noninsurer entities in force-placed insurance litigation. *Gordon*, 868 F. Supp. at 1194. Specifically, the court chose to focus on the "nature of the challenged practice rather than the label placed on the defendant." *Id.* The Eighth Circuit reached a similar result when it first passed on this issue. Doe v. Norwest Bank Minn., 107 F.3d 1297, 1306-07 (8th Cir. 1997). Other district courts have similarly dismissed civil RICO claims in force-placed insurance litigation on grounds that such claims are barred by the McCarran-Ferguson Act. Wexco Inc. v. IMC, Inc., 820 F. Supp. 194, 203 (M.D. Pa. 1993); Senich v. Transamerica Premier Ins. Co., 766 F. Supp. 339, 340-41 (W.D. Pa. 1990). In unrelated litigation, the United States District Court for the Eastern District of Virginia has held that RICO claims for alleged discounting schemes altering respective risk between the insurer and the insured are barred by the McCarran-Ferguson Act. Ambrose v. Blue Cross & Blue Shield of Va., Inc., 891 F. Supp. 1153, 1168 (E.D. Va. 1995).

practice does not constitute the business of insurance, then the McCarran-Ferguson Act does not apply and presents no bar to a RICO claim.[53]

When determining whether a particular claim based on federal law is barred by the McCarran-Ferguson Act, the Fifth Circuit has established a four-part test:[54] 1) does the federal statute specifically relate to insurance?; 2) if not, does the challenged practice constitute the business of insurance?; 3) if so, has the state in question enacted laws regulating the activities at issue?; and 4) if so, will the application of the federal statute invalidate, impair or supersede these laws?"[55] Lenders must meet each element of this complicated test to bar claims against their force-placed insurance practices, but the reward of avoidance of treble damages and attorneys' fees provided for in RICO make it a defense well worth pleading.[56] There is a strong case to be made that RICO claims regarding force-placed insurance are clearly barred by the McCarran-Ferguson test set out above.

Clearly, RICO does not *specifically* relate to insurance—RICO is aimed at organized crime and fraudulent business practices.[57] Just as clearly, force-placed insurance practices qualify as constituting the business of insurance—they involve actual insurance policies spreading risk from one person to another.[58] Without question, Mississippi has laws regulating the exact activity at issue. Mississippi has, inter alia, a Department of Insurance, headed by the Commissioner of Insurance, created by the State to regulate the insurance industry, and included in the Department's power is specific authority to permit and to subsequently control force-placed insurance practices.[59] Additionally, Mississippi has a Department of Banking and Consumer Finance which regulates the lending and insurance-selling practices of banks.[60] Finally, the application of federal civil RICO statutes to state-authorized insurance practices will serve to invalidate, impair, or supersede these state laws authorizing

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[53] *See* Moore v. Fidelity Fin. Servs., 884 F. Supp. 288, 292 (N.D. Ill. 1995) (holding that McCarran-Ferguson does not apply to plaintiff's CPI challenge, because challenged practices are not business of insurance and state law would not be impaired); *Bermudez,* 860 F. Supp. at 591 (holding that RICO does not specifically relate to insurance and thus McCarran-Ferguson does not preempt borrower's CPI claims). *See generally Cochran,* 606 F.2d at 467 (holding that McCarran-Ferguson Act did not preclude application of disclosure requirements under TILA to premium financing transactions).

[54] *Cochran,* 606 F.2d at 464.

[55] *Conning the IADC Newsletters, supra* note 2, at 165 (summarizing Fifth Circuit's four-part test).

[56] *Id.*

[57] 1970 U.S.C.C.A.N. 4007.

[58] *Conning the IADC Newsletters, supra* note 2, at 165. The United States Supreme Court has set out a three-part analysis to determine whether a particular practice constitutes the business of insurance. Group Life & Health Ins. Co.

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v. Royal Drug Co., 440 U.S. 205, 215-17 (1979). Courts should look to "whether the practice has the effect of spreading policyholder risk, whether the practice is an integral part of the insurer-insured relationship, and whether the practice is limited to entities within the insurance industry." *Conning the IADC Newsletters*, *supra* note 2, at 165.

However, applying this three-part analysis, at least one district court has found that none of these characteristics apply to force-placed insurance. *Moore*, 884 F. Supp. at 292. Specifically, with respect to spreading risk, the trial court found that the transfer of risk was completed once the lender purchased the insurance. *Id.* With respect to being an integral part of the insurance relationship, the court found that this practice was actually part of a contract between a lender and borrower rather than an insured and insurer. *Id.* With respect to the practice being limited to the entities within the insurance industry, the court found that the challenged practices were not limited to the particular insurance complained of by the borrower and the borrower's claim could have been based on other allegations. *Id. See* Jeannine M. Glavas & Ana Perich, *Survey of Illinois Law: Insurance*, 20 S. ILL. U. L.J. 883, 885-86 (1996) (discussing court's analysis in *Moore*).

[59] MISS. CODE ANN. § 83-1-1, -3 (1972). All insurance policies written in the state of Mississippi must be specifically approved and authorized by the Commissioner of Insurance. *See* MISS. CODE ANN. § 83-53-15 (1972) (requiring that "[a]ll policies, certificates of insurance, notices of proposed insurance, applications for insurance, endorsements and riders delivered or issued for delivery in this state, and the schedules of premium rates pertaining thereto . . . be filed with the commissioner for his approval prior to use"). Force-placed insurance practices are statutorily authorized. *See* MISS. CODE ANN. § 75-67-121 (1972) (allowing "any licensee" to "charge any borrower on loans of one hundred dollars ($100.00) or more . . . the actual cost of any premium paid for insurance upon any property given as security for a loan").

[60] MISS. CODE ANN. § 81-1-59 to 133 (1972). In addition to approval by the Commissioner of Insurance, policies written by banks are regulated further by the Department of Banking and Consumer Finance. *See generally* MISS. CODE ANN. § 81-1-83 (1972) (describing general examination powers of Commissioner).

force-placed insurance programs. Accordingly, the McCarran-Ferguson Act should present a successful bar to recovery under all federal theories of liability, including claims brought under the civil RICO statutes.

B. Defending Against Reinvestment Injury Claims Brought Under § 1962(a)

Plaintiffs pursuing RICO liability under § 1962(a) run into the additional hurdle of successfully pleading "reinvestment injury" required under the statute.[61] Generally, defaulting plaintiffs allege that bank defendants have engaged in a pattern of racketeering activity consisting of several separate but interrelated instances of mail and wire fraud in furtherance of their scheme to defraud the borrower. Defaulting plaintiffs then specifically allege that the banks have received income derived, directly or indirectly, from a pattern of racketeering activity, which was used to acquire an interest in or maintain the operation of an enterprise in violation of § 1962(a).[62] This "nefarious scheme" allegedly injures the defaulting borrower because it is the investment of income into the enterprise that, in part, enables the bank to continue to operate the enterprise that perpetuates the fraudulent predicate acts against all borrowers.[63] In other words, defaulting plaintiffs are alleging that banks invest the income from their regulated "racket" back into the RICO enterprise (the force-placed insurance program) to defraud even more borrowers.

In addition to the dearth of factual support generally available to support such a claim, these allegations are meritless under the common law development of "reinvestment injuries" under § 1962(a). The Fifth Circuit has held that "[a]ny injury under § 1962(a) must flow from the *use or*

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[61] 18 U.S.C. § 1962(a) (1994). *See supra* note 38 and accompanying text for discussion of subsection (a).

[62] Memorandum Brief in Support of Motion of Union Planters Bank of Northeast Mississippi, for Summary Judgment at 7, Patterson v. First Nat'l Bank (No. 3:96-CV-99-D-D) at 7 (N.D. Miss. Oct. 21, 1997).

[63] Memorandum Brief at 16-17, *Patterson* (No. 3:96-CV-99-D-D).

investment of racketeering income," rather than from mere racketeering activity.[64] An allegation that a corporate defendant, such as a bank, has reinvested the income from a racketeering enterprise into its own operations, thereby enabling it to continue injuring victims, cannot state a claim under section 1962(a).[65] Merely alleging that the re-investment of racketeering income "keeps the defendant alive so that it may continue to injure plaintiff is insufficient to meet the injury requirement of section 1962(a)."[66] Plaintiffs must show that their injuries are the result of the bank's investment of the proceeds, rather than as a result of the predicate acts themselves.[67]

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[64] Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 584 (5th Cir. 1992) (emphasis added). The subject of the litigation here was not force-placed insurance, but the lesson to be learned about what constitutes "reinvestment injury" is the same. Clearly, more than a showing of the underlying racketeering activity is required in order to sustain a § 1962(a) violation. The Fifth Circuit went on to say that unless the plaintiff's injury stemmed from the investment of racketeering income, plaintiff had pleaded no cause of action under § 1962(a) and dismissal was appropriate. *Parker & Parsley Petroleum Co.*, 972 F.2d at 584. *See also* Crow v. Henry, 43 F.3d 198, 204-05 (5th Cir. 1995) (discussing requirements for reinvestment injury generally). In dismissing a RICO claim in force-placed insurance litigation, the United States District Court for the Southern District of Mississippi recently held that "[i]t is not sufficient to merely show that a defendant invested or used the income derived from its pattern of racketeering activity to facilitate its own general operations and that the continuing operation of the enterprise injured the plaintiffs." Turner v. Union Planters Bank, 974 F. Supp. 890, 894 (S.D. Miss. 1997).

[65] *Parker & Parsley Petroleum Co.*, 972 F.2d at 584. The Third Circuit came to a similar holding, noting:

> [T]he use-or-investment injury requirement [of section 1962(a)] would be almost completely eviscerated when the alleged pattern of racketeering is committed on behalf of a corporation. . . . Over the long term, corporations generally reinvest their profits, regardless of the source. Consequently, almost every racketeering act by a corporation will have some connection to the proceeds of a previous act. Section 1962(c) is the proper avenue to redress injuries caused by the racketeering acts themselves. If plaintiffs' reinvestment injury concept were accepted, almost every pattern of racketeering activity by a corporation would be actionable under section 1962(a), and the distinction between section 1962(a) and section 1962(c) would become meaningless.

Brittingham v. Mobil Corp., 943 F.2d 297, 305 (3d Cir. 1991). All but two of the other Circuits who have considered the issue have come to a similar conclusion. *See* Vemco, Inc. v. Camardella, 23 F.3d 129 (6th Cir. 1994); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3rd Cir. 1993); Ouaknine v. MacFarlane, 897 F.2d 75 (2nd Cir. 1990). *Contra* Busby v. Crown Supply, Inc., 896 F.2d 833, 838 (4th Cir. 1990) (holding that "the broadly drafted 'by reason of' language in § 1964(c) allows recovery for such injuries, despite the fact that one element of the violation, the use of the proceeds, may not have contributed to or caused the injury") and Nugget Hydroelectric v. Pacific Gas & Elec., 981 F.2d 429 (9th Cir. 1992) (adopting reasoning of *Busby* court).

C. Challenging the "Intent to Deceive" Element of § 1962(c) in Credit Life and Disability Cases Predicated on Mail Fraud

A recent line of pro-defense decisions regarding credit life and disability insurance policies force-placed by banks and insurance companies has developed in several federal courts. These cases have been resolved in favor of defendants when borrowers brought actions based on civil RICO predicated on mail and wire fraud. Mail and wire fraud violations require a showing that the defendant engaged in a "scheme to defraud" and used the mail or interstate wire services in furtherance of that scheme.[68] Additionally, such a scheme must have been undertaken "with the specific intent to defraud."[69] These cases have seen RICO claims dismissed for failure to show an intent to deceive on the part of the lender/insurer merely when such lender/insurer fails to institute an automatic refund mechanism to insure that refunds are paid on cancellation or early termination of the loan.[70] Allegations of sloppy or mediocre business practices alone are not enough to establish civil RICO liability based on mail fraud.[71] If no other fed-

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[66] *Lightning Lube*, 4 F.3d at 1188. *See* Update Traffic Sys., Inc. v. Gould, 857 F. Supp. 274, 282-283 (E.D. N.Y. 1994) (holding that "[1962(a)] investment-injury requirement is not satisfied merely because the defendant/enterprise has reinvested money from the racketeering acts back into it own operations, thus enabling the scheme to continue"). *See also* Pemberton Sales & Serv. v. Banco Popular de P.R., 877 F. Supp. 961 (D.V.I. 1994); Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1101 (D.N.J. 1991); R.C.M. Executive Gallery Corp. v. Rols Capital Co., 901 F. Supp. 630 (S.D.N.Y. 1995); *see* Vista Co. v. Columbia Pictures Indus., Inc., 725 F. Supp. 1286 (S.D.N.Y. 1989); *In re* American Honda Motor Co., Inc. Dealerships Relations Litig., 941 F. Supp. 528 (D. Md. 1996).

[67] *Update Traffic Systems*, 857 F. Supp. at 283.

[68] Sousa v. North Cent. Life Ins. Co., 910 F. Supp. 53, 56 (D. R.I. 1995) (*citing* McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 790 (1st Cir. 1990)).

[69] *Id.*

[70] Richards v. Combined Ins. Co. of Am., 55 F.3d 247, 253 (7th Cir. 1995).

The Seventh Circuit is the only federal appellate court to have passed on the issue, and it affirmed the dismissal of the plaintiff's RICO claim on Defendant's Motion for Summary Judgment. *Richards*, 55 F.3d at 253. In *Richards*, the defendant insurer agreed to promptly refund any unearned premium if the loan was paid off before the scheduled termination date. *Id.* at 248. The insurer failed to implement a monitoring mechanism that would put it on notice of early loan repayment, instead relying on notice from the borrowers. *Id.* at 249. Plaintiffs conceded that the certificates of insurance in issue were not alleged to be fraudulent per se. *Id.* at 250. The district court granted summary judgment to defendant insurer on the RICO claim for failure to prove that defendants had effectuated a fraudulent scheme through use of the mail and wire services. *Id.* The burden of proving such a scheme to defraud is squarely on the plaintiff. *Id.* at 252. Because the certificates of insurance are conceded to contain no misstatement of fact or intent, there can be no showing by the plaintiff of a scheme to defraud sufficient to give rise to civil RICO liability. *Id.* While these certificates could have possibly been better written, the court held that no reasonable jury could imply from them a scheme to defraud. *Id.* "Mediocre or sloppy business practices, without the requisite intent to defraud, will not support an allegation of mail fraud." *Id.* at 253.

[71] *See supra* note 70 and accompanying text. Two other district courts have considered the issue. The United States District Court for the District of Rhode Island dismissed a civil RICO claim brought against a credit life and disability insurer based on the insurer's failure to institute mechanisms to automatically repay unearned premiums when the underlying loan was repaid prematurely. *Sousa*, 910 F. Supp at 54. The insurance certificate issued to Sousa read, in part:

> This insurance stops on the Termination Date, shown in the benefit schedule or when your loan is paid off, renewed, refinanced or otherwise stops, whichever happens first. *If your insurance stops before the Termination Date, you will be given a refund or a credit on your account or unearned premium.*

Id. at 54-55. Sousa discharged the loan prior to the stated termination date and was therefore entitled to a refund under the terms of the certificate, yet never received such a refund from North Central. *Id.* at 55. Sousa asserted that North Central had "intentionally failed to institute adequate procedures to ensure that debtors receive an automatic refund or credit of any unearned premiums." *Id.* Sousa's section 1962(c) RICO claim was predicated on the racketeering activities of mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. *Id.* at 56. Mail and wire fraud violations require a showing that defendant engaged in a "scheme to defraud" and used the mail or interstate wire services in furtherance of that scheme. *Id.* Further, such a scheme must have been undertaken "with the *specific intent* to defraud." *Id.* (quoting *McEvoy Travel Bureau, Inc.*, 904 F.2d at 790). The district court found that North Central in fact never received notice of the early discharge of the loan, Sousa himself never notified North Central of such discharge (except through commencement of the lawsuit), and the insurance certificate contained no eral claims are involved, then the federal district court will decline to exercise jurisdiction over remaining state law claims.[72]

D. Challenging Injury in Nonfiling Insurance Cases

Nonfiling insurance is a type of force-placed insurance practice carried on by banks which substitutes charging the borrower a filing fee to perfect the lender's security interest with a small fee for the purchase of nonfiling insurance policy or the creation of a default reserve from which the lender may in effect self-insure.[73] The limited risk to which any such policy would be addressed is triggered only by the borrower's default *and* the presence of a subsequent secured creditor.[74]

The charging of nonfiling insurance was specifically provided for in the Mississippi Code until June 30, 1995.[75] Pres-

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misstatements or misrepresentations of fact. *Id.* at 56. Calling the language in the certificate "far from a model of clarity," the district court held that such language nevertheless fell short of wilful, deceitful, or fraudulent design and thus did not rise to the level of a scheme to defraud. *Id.* at 57. *See also* Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509, 516 (N.D. Ill. 1995) (holding that insurance certificates alone were insufficient to allege fraud so as to survive summary judgment).

[72] *See Sousa*, 910 F. Supp. at 54 (declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) over remaining state law claims once RICO claim dismissed); *Hoban*, 163 F.R.D. at 516-517 (same).

[73] *See supra* note 11 and accompanying text for full discussion of nonfiling insurance.

[74] *See supra* note 11 and accompanying text for full discussion on the specific risk that nonfiling insurance is tailored to address.

[75] Two sets of statutes arguably apply to the challenged practice of charging nonfiling fees—MISS. CODE ANN. § 75-67-101 *et seq.* (Mississippi Small Loan Regulatory Law) and MISS. CODE ANN. § 75-17-19 (governing retail installment contracts). The charging of nonfiling insurance is not specifically authorized in MISS. CODE ANN. § 75-67-121, which authorizes other forms of force-placed insurance including credit life, credit disability, and accident and health insurance. MISS. CODE ANN. § 75-67-121 (1991). However, transactions charging nonfiling insurance taking place before July 1, 1995, were specifically provided for in now-repealed regulations issued by the Mississippi Department of Banking and Consumer Finance. MISS. SMALL LOAN LAWS REGS. § 20 (1990) (repealed July 1, 1995). Section 20 permitted licensees to "lend to and collect from the borrower the actual cost of filing any instrument executed to evidence, perfect, cancel, or terminate security for a loan." MISS. SMALL LOAN LAWS REGS. § 20 (1990) (repealed July 1,

ently, there is no guidance from the legislature or the Department of Banking and Consumer Finance regarding the permissibility of charging nonfiling insurance fees.[76]

When faced with a lawsuit based on charging of nonfiling insurance fees, bank defendants should begin by asserting that, unless specifically prohibited, the charging of such fees was permissible conduct of lenders in consumer loans.[77] Next, defendants should challenge the failure of plaintiffs to demonstrate any injury from the alleged lending practice. Most of these arrangements call for nonfiling fees which are smaller than the filing fee would have been. Departmental experts on the Mississippi Small Loan Regulatory Act at the Mississippi Department of Banking and Consumer Finance have asserted

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1995). Section 20 further provided:

> [i]n lieu of the . . . filing fees, the lender may charge a non-filing insurance premium but such charge shall be made only in the event that insurance on the loan is obtained by the lender from a bona fide and licensed insurance company doing business in the State of Mississippi and these fees are to be disbursed to a bona fide insurance company. . . . A copy of the non-filing insurance policy shall be maintained in the insurance file in the office of the licensee. Such costs shall be disclosed to the borrower by the licensee as either "fees to public officials" or "non-filing insurance premiums."

MISS. SMALL LOAN LAWS REGS. § 20 (1990) (repealed July 1, 1995). The set of regulations which replaced this set of guidelines specifically excludes any mention of nonfiling insurance premiums. MISS. SMALL LOAN LAWS GUIDELINES § D (1995). Credit life, property, and disability are the only types of insurance, force-placed or otherwise, mentioned in the regulations. *Id.*

It is possible that these statutes don't apply at all. MISS. CODE ANN. § 75-17-19 governs retail installment contracts and closed end credit sales of goods. MISS. CODE ANN. § 75-17-19 (1991). This statute similarly makes no specific allowance for the charging of nonfiling insurance. *Id.* However, this statute is a more general law leaving more room to argue that unless the statute specifically prohibits such a practice, it is acceptable.

[76] *See supra* note 75 and accompanying text for full discussion of the regulatory environment surrounding charging nonfiling insurance by banks in retail installment contracts.

[77] *See supra* notes 75-76 and accompanying text. Some regulators assert that the general statute on retail installment contracts, § 75-17-19, rather than the more specific statute, § 75-67-121, applies to situations in consumer finance where nonfiling insurance premiums have been charged to consumers/borrowers. Interview with Mr. Billy Tannehill of the Mississippi Department of Banking and Consumer Finance in Jackson, Miss. (July 1997).

that these practices were beneficial rather than harmful to consumers and that the borrower-consumer was actually able to save money due to these policies.[78] Additionally, affidavits or expert testimony for trials regarding the benefit to consumers as expressed by these experts are potentially obtainable.

E. Challenge Plaintiff's Pleading of the RICO Claim

While it may be fairly simple to plead breach of contract and fiduciary duty claims and other claims brought under state theories of liability, RICO is "notoriously difficult" to plead.[79] Accordingly, defendants should not pass up the opportunity to challenge RICO claims based on the sufficiency of the pleadings.[80] The principal drawback to an insufficient pleadings defense is that it generally leads to a dismissal without prejudice based on a pleading defect rather than a more final dismissal based on the merits of the lawsuit.[81]

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[78] *Id.*

[79] *Conning the IADC Newsletters, supra* note 2, at 165. *See* Doxie v. Ford Motor Credit Co., 603 F. Supp. 624, 627-28 (S.D. Ga. 1984) (dismissing complaint for failure of plaintiff to meet pleading specificity requirements of FED. R. CIV. P. 9(b)). Fraud actions must be pled with specificity to survive motions for summary judgment. FED. R. CIV. P. 9(b). RICO actions similarly carry a requirement that allegations in the pleadings be pled with particularity. *See, e.g.,* Taylor v. Bear, Stearns & Co., 572 F. Supp. 667, 682-83 (N.D. Ga. 1983). For instance, a plaintiff predicating a RICO claim on mail fraud must set out the time, place, and contents of the purported false representations. *Doxie*, 603 F. Supp. at 627. Additionally, plaintiffs must allege with specificity "in what respect each of the statements were false and misleading, and the factual basis for believing that the defendant acted with an intent to defraud." *Id.* (quoting Serig v. South Cook County Serv. Corp., 581 F. Supp. 575, 580 (N.D. Ill. 1984)).

[80] *See* Travis v. Boulevard Bank, 880 F. Supp. 1226, 1228 (N.D. Ill. 1995) (dismissing borrower's RICO claim in CPI case for failure to establish pattern of racketeering activity); Dixon v. TCF Bank Illinois, 1995 WL 622409 at *2 (N.D. Ill. 1995) (dismissing borrower's RICO claim in CPI case for insufficient allegations of enterprise through which alleged racketeering activity took place, insufficient allegations of racketeering activity, and insufficient allegations of pattern of racketeering activity); Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 645-66 (7th Cir. 1995) (dismissing borrower's RICO claim in CPI case for failure to allege enterprise or present enterprise separate and distinct from person sought to be held liable).

[81] *Conning the IADC Newsletters, supra* note 2, at 165. *See Travis*, 880 F. Supp. at 1228 (dismissing without prejudice and with leave to amend and refile

V. CONCLUSION

As increasing numbers of the meritorious lawsuits attacking the more suspect force-placed insurance practices are settled or tried, what ultimately will be left are lawsuits brought against very defensible, legitimate lending and insurance practices. Successfully defending these suits based on the legitimacy of the lending and insurance practices in issue requires consistent characterization of force-placed programs as business practices authorized by both the loan agreement and state law. Further, it should be consistently noted that these practices are beneficial to both the lender and the borrower, and that conflict will typically arise as a result of default or other misbehavior by the borrower. Most importantly, lenders should disclose these practices on the front end and explain to borrowers precisely what type of insurance will be purchased in the event that the borrower fails to procure such insurance on their own. If litigation is the ultimate result, RICO claims are defensible in a multitude of ways as set out in the preceding paragraphs.

P. Ryan Beckett

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borrower's RICO claim for failure to establish pattern of racketeering activity).

RECENT DECISION

FAMILY LAW—PARENTAL RIGHTS OF AN UNWED FATHER—AN UNWED FATHER SECURES PARENTAL RIGHTS BY ESTABLISHING A RELATIONSHIP WITH HIS CHILD

On January 14, 1992, Joseph Smith, Jr. filed suit seeking a declaration of paternity, an order for custody and an injunction to stop adoption proceedings within and outside Mississippi after learning of Natalie Malouf's desire to place their illegitimate child up for adoption.[1] The Leflore County Chancery Court granted a permanent injunction prohibiting Malouf and others from proceeding with an adoption.[2] Only after the baby's birth did Smith actually discover the whereabouts of the child, and by that point, Malouf had violated the injunction, allowing a Canadian couple to adopt the child.[3] Smith and his parents filed a further action against Malouf and her parents in Leflore County Circuit Court, alleging intentional infliction of emotional distress and civil conspiracy to prevent Smith from exercising parental rights and to arrange an illegal adoption.[4]

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[1] Smith v. Malouf, 722 So. 2d 490 (Miss. 1998).

[2] *Smith*, 722 So. 2d 490, 492. Smith and Malouf dated as teenagers for over two years. *Id.* at 491. In August 1991, Smith impregnated Malouf. *Id.* Smith asked Malouf to marry him, but she declined. *Id.* After discussing the situation with their parents, a dispute arose as to the unborn child's future. *Id.* Malouf and her parents wished to place the child for adoption. *Id.* Smith and his parents, on the other hand, wanted Smith to have full responsibility for the child. *Id.* Following several confrontations with the Smiths, Malouf left Greenwood, Mississippi, and her parents refused to disclose her whereabouts. *Id.*

Upon entry of the chancellor's injunction, Smith mailed copies of the order to all Vital Statistics offices in the State of Mississippi. *Id.* at 492. Smith further attempted to prevent the adoption of his child by hiring private investigators to locate Malouf. *Id.*

On October 22, 1992, the circuit court dismissed Smith's suit.[5] On appeal, the Mississippi Supreme Court held: Affirmed in part, reversed and remanded in part.[6] The court held that when a putative father made significant efforts to develop a relationship with the child, he gained constitutional rights to receive notice of and to object to the adoption of his child.[7]

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[3] *Id.* Malouf gave birth to the child on April 21, 1992, in Marietta, Georgia. *Id.* Upon discovering Malouf's whereabouts, Smith traveled to Georgia to seek custody of the child. *Id.* However, Smith arrived in Georgia too late. *Id.* Malouf, along with her parents, fled to California, where a Canadian couple adopted the child. *Id.*

[4] *Id.* With the adoption finalized, Smith and his parents had no other recourse than to file tort actions. *Id.* at 497.

[5] *Id.* at 493. In September 1992, Malouf filed a 12(b)(6) motion to dismiss the suit in circuit court. *Id.* At that point, the chancellor stayed all proceedings in the chancery court and suspended his prior orders except for the order declaring Smith the natural father. *Id.* On October 2, 1992, after learning of the adoption, the circuit court delayed the adoption until it arrived at a resolution in the Mississippi action. *Id.* Following the circuit court's dismissal, Smith and his parents filed an appeal to the Mississippi Supreme Court. *Id.*

[6] *Id.* at 499. The Mississippi Supreme Court affirmed the circuit court's decision to dismiss the claims of Smith's parents. *Id.* As grandparents, Smith's mother and father lacked parental rights, and, thus, the circuit court quickly rejected their conspiracy claims. *Id.* On appeal, the Mississippi Supreme Court also dismissed the Smiths' contention they had standing on the grounds the adoption caused them mental and emotional pain as well as monetary damages. *Id.*

As for Smith himself, the court ruled he possessed the proper standing needed to bring intentional infliction of emotional distress and conspiracy claims and reversed and remanded the suit to allow him to present his case. *Id.* at 498. Despite Mississippi's statutory scheme, the court determined current case law expanded the father's constitutional rights to include, in some circumstances, the right to prevent the adoption of his child by withholding his consent. *Id.* at 497.

[7] *Id.* The court held that recent United States Supreme Court case law required this change from the thinking embodied in Mississippi's common law and statutory law. *Id.* The court felt that Smith satisfied this burden by taking rea-

I. RELATED LAW

A. The Presumption of Unfitness

The United States Supreme Court considered the proper level of protection to be afforded an unwed father in *Stanley v. Illinois.*[8] In *Stanley*, the Cook County Circuit Court, without first providing a hearing, dismissed the equal protection claim of an unwed father who lived with and raised his children but lost custody when the mother died.[9] Reversing the Illinois courts, the Court held that, like married parents, the unwed father had the right to a hearing on his fitness as a parent before the State removed his children from him.[10] The Court

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sonable steps, including filing a declaration of paternity, seeking an injunction, and hiring private investigators to establish a relationship with the child. *Id.* Despite Smith's lack of success in actually creating a relationship with the child, the court rewarded his efforts, noting that but for Malouf, Smith would have established the required relationship. *Id.*

[8] 405 U.S. 645 (1972).

[9] *Stanley*, 405 U.S. at 646. The circuit court's ruling turned upon an Illinois law which afforded only "parents" the right to a hearing on their parental fitness prior to a child's removal from their custody. *Id.* at 650. Under the Illinois law, "parents" included the father and mother of legitimate children, or the survivor of them, the natural mother of an illegitimate child, and adoptive parents, but not unwed fathers. *Id.* The Illinois law simply presumed unwed fathers unfit without an inquiry into that assumption's validity. *Id. Stanley* rejected the idea that an unwed father lacked fitness as a parent. Alexandra R. Dapolito, Comment, *The Failure to Notify Putative Fathers of Adoption Proceedings Balancing the Adoption Equation*, 42 CATH. U. L. REV. 979, 980 (1993).

[10] *Stanley*, 405 U.S. at 649. The Court addressed the issue of an unwed father's parental rights for the first time in *Stanley*. Mary L. Shanley, *Unwed Fathers' Rights, Adoption and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 70 (1995). Prior to *Stanley*, most states afforded unwed fathers few, if any, parental rights. Kara L. Boucher & Ruthann M. Macolini, *The Parental Rights of Unwed Fathers: A Developmental Perspective*, 20 N.C. CENT. L.J. 45, 45-46 (1992).

As in *Stanley*, other courts protected the rights of unwed fathers, rejecting state laws which denied the fathers' parental rights on the basis of their unmarried status. *See* Pearson v. Clark, 382 So. 2d 482, 483 (Miss. 1980). There, the mother prevented the father from establishing any sort of relationship with the child, but the court preserved the father's parental right of visitation based on his constant efforts to create such a relationship. *Pearson*, 382 So. 2d at 483. The *Pearson* court characterized the State's outright cancellation of a father's parental rights due to his unwed marital status as too severe. *Id. See also* Mixon v. Mize, 198 So. 2d 373, 375 (Fla. Dist. Ct. App. 1967) (holding that unwed father de-reasoned that after siring and raising his children, an unwed father's interests warranted strong protections absent a powerful countervailing state interest.[11]

B. The Right to Form a Relationship

The United States Supreme Court addressed the question of whether a state had the authority to deny an unwed father the power to prevent the adoption of his child in *Quilloin v. Walcott.*[12] In *Quilloin*, the trial court permitted the illegitimate child's adoption by the stepfather, over the natural father's objections because it deemed the adoption to be in the child's best interests.[13] The Georgia Supreme Court affirmed

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served parental right of visitation after establishing relationship with child and providing support); Taylor v. Taylor, 295 So. 2d 494, 495 (La. Ct. App. 1974) (allowing unwed father visitation rights where he provided care and support of children).

[11] *Stanley*, 405 U.S. at 651. The Court placed extreme importance on the family. *Id. See also* May v. Anderson, 345 U.S. 528, 533 (1953) (describing parental right of custody as much more important than property rights); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (referring to right to procreate as basic human liberty); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (including right to raise children in list of constitutional liberties). Rights traditionally viewed as fundamental, such as parental rights, received strong protection under the Due Process Clause. Kovacs v. Cooper, 336 U.S. 77, 95 (1949). The *Stanley* Court added that this reverence for the family extended into relationships unlegitimized by marriage. *Stanley*, 405 U.S. at 651. *See also* Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (allowing illegitimate child to maintain wrongful death action for death of mother).

While remaining protective of the rights of both parents, the Court favored the mother's rights when considering the abortion issue. Doe v. Smith, 486 U.S. 1308, 1309 (1988). Although the Court recognized the father's interests in the unborn fetus, the Court refused to grant the father veto authority over an abortion because the court realized pregnancy had a much greater impact on the mother's liberty. Planned Parenthood v. Casey, 505 U.S. 833, 895-97 (1992). *See also* Toni L. Craig, Comment, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U.L. REV. 391, 401 (1998) (asserting that mother's right to abort was one of few interests possible of overcoming biological father's constitutional rights).

[12] 434 U.S. 246 (1978).

[13] *Quilloin*, 434 U.S. at 251. The unwed father had only one way to prevent adoption–legitimation of the child. *Id.* at 249. *See also* Parham v. Hughes, 441 U.S. 347, 353 (1979) (denying unwed father's suit for wrongful death of child where father had not secured his parental rights through legitimation); Nale v.

the decision, pointing to the State's policy of promoting the rearing of children in a family setting such as the one established by the natural mother and stepfather.[14] On appeal, the United States Supreme Court affirmed, agreeing with the State that the ruling did not deny due process or equal protection to the father who failed, for over eleven years, to accept any parental responsibilities.[15] The Court reasoned that the

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Robertson, 871 S.W.2d 674, 677 (Tenn. 1994) (holding that unwed father protected his paternal right to object to child's adoption by legitimating child). The trial court in *Quilloin* chose to review the father's petition for legitimation despite prior Georgia case law declaring such petitions made after the filing of an adoption petition to be void. *Quillion*, 434 U.S. at 250-51 n.8. *See* Smith v. Smith, 162 S.E.2d 379, 383-84 (Ga. 1968) (holding unwed father's petition for legitimation, made after mother consented to adoption, to be insufficient to overturn adoption). *But cf.* Clark v. Buttry, 177 S.E.2d 89, 89 (Ga. 1970) (finding trial court's consideration of unwed father's objection to adoption not reversible error even though father had not attempted to legitimate child prior to mother's consent to adoption), *aff'g* 174 S.E.2d 356, 359 (Ga. Ct. App. 1970).

The trial court in *Quilloin*, declaring it to be in the child's best interests, denied the unwed father's legitimation petition. *Quilloin*, 434 U.S. at 251. *But cf.* Susan Swingle, Comment, *Rights of Unwed Fathers and the Best Interests of the Child: Can These Competing Interests Be Harmonized? Illinois' Putative Father Registry Provides an Answer*, 26 LOY. U. CHI. L.J. 703, 703-04 (1995) (criticizing courts for considering fitness of adoptive home in decision to terminate father's parental rights).

[14] *Quilloin*, 434 U.S. at 252. The unwed father appealed to the Georgia Supreme Court, claiming that the Georgia adoption statutes violated his right to equal protection and due process. *Id.* In rejecting the unwed father's claims, the court noted the father's failure for eleven years to legitimate the child and decided the child's best interests required the court to permit his adoption into a family that sought to establish a healthy environment. *Id.* at 252-53.

Similarly, the Louisiana Supreme Court decided that, upon an unwed father's demonstration of total commitment to parental obligations, he obtained protected parental rights. *In re* R.E., 645 So. 2d 205, 206 (La. 1994). If the father showed full commitment and the court deemed him a fit parent, he earned the right to custody of the child. *In re R.E.*, 645 So. 2d at 206. *See also In re* K.N.K., 705 So. 2d 220, 224 (La. Ct. App. 1997) (holding that unwed father had to display, by preponderance of evidence, his commitment to his relationship with child and his parental fitness to be able to object to child's adoption); *In re* E.C.B., 691 So. 2d 687, 690 (La. Ct. App. 1997) (allowing unwed father to oppose child's adoption after taking reasonable steps to create relationship with child, including such measures as placing his name on state's putative father registry); Durr v. Blue, 454 So. 2d 315, 320-21 (La. Ct. App. 1984) (finding adoption null and void because court failed to provide notice of proceeding to unwed father who showed commitment to his relationship with child).

[15] *Quilloin*, 434 U.S. at 255. The Court ruled an unwed father's biological link

State had no duty to apply the same standards utilized with fathers who were separated or divorced with an unwed father when the unwed father provided some financial support but never sought custody or other responsibilities concerning the child's supervision or care.[16]

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to his child failed to provide him an absolute right to object to his child's adoption and establish a relationship with his child. Lehr v. Robertson, 463 U.S. 248, 261 (1983). Rather, the father had to actively endeavor to establish a significant relationship with the child in order to gain those limited rights. *Lehr*, 463 U.S. at 261. *See also* Robert O. v. Russell K., 604 N.E.2d 99, 104 (N.Y. 1992) (finding unwed father's rights terminated due to failure to promptly accept parental responsibilities). The *Lehr* Court reasoned that because the father never availed himself of the state-maintained putative father registry nor attempted otherwise to create a relationship with the child, he deserved no protection of his parental rights. *Lehr*, 463 U.S. at 262-64. *See also In re* Adoption of Reeves, 831 S.W.2d 607, 609 (Ark. 1992) (noting unwed father's right to notice of child's adoption arose when he placed his name on state's putative father registry). New York law presumed an unwed father not listed in the registry had no pertinent evidence of the child's best interests, and thus, the *Lehr* Court found no error in the trial court's failure to notify the father of the adoption proceeding. Jennifer J. Raab, Lehr v. Robertson*: Unwed Fathers and Adoption–How Much Process is Due?*, 7 HARV. WOMEN'S L.J. 265, 266-68 (1984). One commentator concluded the decision produced troublesome results because the rights of the child became less important than adherence to a strict statutory scheme designed to simplify adoptions. *Id.* at 275.

[16] *Quilloin*, 434 U.S. at 255-56. When the State revoked the rights of parents in a normal family, the Court required evidence of parental unfitness and a finding that the decision best promoted the child's welfare. Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977). The State's actions in *Quilloin*, however, constituted nothing more than a decision to deny rights to a father who never sought their enforcement in eleven years. *Quilloin*, 434 U.S. at 255.

However, the Court allowed an unwed father to veto his children's adoption where the father actually lived with and raised his children to the ages of four and six. Caban v. Mohammed, 441 U.S. 380, 389 (1979). The *Caban* Court found state adoption laws which gave the unwed father the authority to overturn the proceeding only if he showed the adoption to not be in the child's best interests unconstitutional. *Caban*, 441 U.S. at 384-85. Despite the law's tendency to create results favorable to the child, the Court ruled the gender-based distinction lacked sufficient justification as it failed to be reasonably related to the furtherance of legitimate state goals. *Id.* at 391. *See also* Reed v. Reed, 404 U.S. 71, 76 (1971) (holding Idaho statute, providing preference for males in selection of estate administrators, unconstitutional as it advanced no significant state goals); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (finding Virginia tax on income earned outside State by domestic corporation to violate equal protection for failure to be substantially related to legitimate state interest).

C. The Presumption of Paternity

The United States Supreme Court examined the parental rights of an unwed father, presumed under state law not to be the biological father, in *Michael H. v. Gerald D.*[17] In *Michael H.*, the California Superior Court dismissed the unwed father's action to establish paternity of and to obtain visitation rights with a child conceived in an affair with a married woman.[18] Affirming that decision,[19] the United States Supreme

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[17] 491 U.S. 110 (1989).

[18] *Michael H.*, 491 U.S. at 115. Michael H. impregnated a neighbor, but the woman allowed everyone to believe her husband had sired the child. *Id.* at 113-14. A blood test later revealed a 98.07% probability that Michael H. sired the child. *Id.* at 114. Over the next three years, the mother and child lived with three different men including her husband and Michael H. *Id.* Michael H. held the child out as his daughter while she stayed with him. *Id.* When the mother left Michael H. and refused his requests to see the child, Michael H. filed suit in the California Superior Court. *Id.*

The mother's husband intervened in the suit and moved for summary judgment on the grounds that California law presumed the husband to be the biological father, so long as he lived with the mother and could procreate. *Id.* at 115. *See also* Krohn v. Migues, 274 So. 2d 654, 657 (Miss. 1973) (noting that common law presumed husband to be child's father unless he could not procreate or had no access to wife). Under the common law, an unwed father lacked the ability to rebut this presumption simply by proving the affair occurred. Gayle Wintjen, Note, *Make Room for Daddy: A Putative Father's Rights to His Children*, 24 NEW ENG. L. REV. 1059, 1064 (1990). California allowed rebuttal of the presumption by blood tests, but the time limit on that provision expired two years after the child's birth. *Michael H.*, 491 U.S. at 115. The trial court granted summary judgment against Michael H., and further refused his request for visitation because it found the presence of two male authority figures was not in the child's best interests. *Id.* at 135 (Stevens, J., concurring).

[19] *Michael H.*, 491 U.S. at 132. Justice Scalia delivered the Court's plurality opinion, in which three other Justices joined. *Id.* at 113. Justice Stevens concurred, casting the deciding vote against the unwed father. *Id.* at 132-36 (Stevens, J., concurring). In his dissenting opinion, Justice Brennan argued against the Court's reliance on the historical distinctions between the rights of unwed fathers and those of the marital family in determining the outcome of the case. Joan C. Sylvain, Note, Michael H. v. Gerald D.*: The Presumption of Paternity*, 39 CATH. U. L. REV. 831, 835 (1990). Justice Brennan stated that the unwed father deserved his parental rights after forming a relationship with his child. *Michael H.*, 491 U.S. at 148-49 (Brennan, J., dissenting). *See also* Alexandra Maravel, *Intercountry Adoption and the Flight from Unwed Fathers' Rights: Whose Right Is It Anyway?*, 48 S.C. L. REV. 497, 508 (1997) (claiming due process guaranteed unwed father limited right to create relationship with his child).

Court asserted that the statute did not deprive the unwed father of any rights because such fathers had not historically received the same protections afforded the traditional marital family.[20] The Court reasoned that the State's strong interest in promoting and guarding the family unit outweighed the rights of an adulterous lover, even when the unwed father established a relationship with the child.[21]

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[20] *Michael H.*, 491 U.S. at 122-24. The Court declared that because unwed fathers had never received the same protections afforded the marital family, the statute did not deprive this father of due process. *Id.* at 124. By limiting the unwed father's rights, the Court prevented Michael H. from exercising his rights to the detriment of the existing marital family. *Id.* The *Michael H.* plurality rejected Justice Brennan's proposal of examining only the unwed father's relationship with his child to decide the extent of his rights. *Id.* at 124 n.4. The Court compared such an approach to a case in which a person could shoot someone, based on the right to fire a gun, without considering the victim's rights. *Id.*

The *Lehr* Court similarly allowed a statute to favor the family's rights over those of an unwed father. *Lehr*, 463 U.S. at 257. *See also* Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (overruling city housing ordinance that prevented extended family from sharing single dwelling unit); Trimble v. Gordon, 430 U.S. 762, 769 (1977) (overruling statute that allowed illegitimate children to inherit only from their mother, but maintaining Court's support for laws promoting legitimate family relationships); McGowan v. Maryland, 366 U.S. 420, 426 (1961) (declaring that statutes may discriminate so long as state put forth sufficient facts to justify discrimination).

[21] *Michael H.*, 491 U.S. at 123-24. The Court previously upheld the sanctity of the family and the parent-child relationship. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The *Michael H.* Court, however, noting the difference between the traditional marital family and an unwed father's relationship with his child, asserted that the traditional family deserved stronger protection, including protection from an unwed father's attempts to disrupt the family's structure. *Michael H.*, 491 U.S. at 124. Rejecting the contention that *Stanley* allowed such fathers to protect their paternal rights by assuming parental duties, the *Michael H.* Court stated that *Stanley* simply revealed a deep respect for and a willingness to promote the unitary family. *Id.* at 123. Thus, despite the father's relationship with the child, the Court permitted the denial of his claim. *Id.* at 124.

In a case similar to *Michael H.*, the Mississippi Supreme Court denied an unwed father's petition to overturn his child's adoption. Humphrey v. Pannell, 710 So. 2d 392, 397-98 (Miss. 1998). The *Humphrey* court, however, did not need to rely on *Michael H.* because the father made no efforts to develop a relationship. *Humphrey*, 710 So. 2d at 397.

At least one commentator suggested that *Michael H.* had only a minor impact on the rights of unwed fathers, pointing out that Justice Stevens cast his deciding vote as he did only because the trial court allowed the father a hearing prior to the revocation of his rights. Gail A. Secor, Comment, Michael H. v. Ger-

D. The "Living Together" Requirement

The New York Court of Appeals considered whether the State had the authority to deny an unwed father the right to prevent his child's adoption because he had not lived with the mother for six months prior to the adoption in *In re Raquel Marie X.*[22] In *In re Raquel Marie X*, the New York Supreme Court, Appellate Division, rejected one unwed father's attempts to veto the adoption of his child because the father's tumultuous relationship with the mother failed to satisfy the statute's "living together" requirement. However, the Appellate Division permitted another unwed father, who technically failed to meet the requirement to nullify the adoption of his child, to veto his child's adoption because he made every possible effort to comply with the statute.[23] Overruling the Appellate Division in the former case and affirming in the latter, the New York Court of Appeals held the statute unconstitutional because it did not directly further the State's interests of promoting the family unit and of protecting children from unwed fathers who did not intend to assume total parental re-

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ald D.: *Due Process and Equal Protection Rights of Unwed Fathers*, 17 HASTINGS CONST. L.Q. 759, 781 (1990).

[22] 559 N.E.2d 418 (N.Y. 1990).

[23] *In re Raquel Marie X*, 559 N.E.2d at 420. Under New York law, an unwed father had no veto power over the adoption of his child unless he lived with the child or the child's mother for the six months preceding the child's adoption, held the child out as his, and paid medical expenses related to the pregnancy. *Id.* at 419. Neither unwed father in the consolidated case of *In re Raquel Marie X* met the "living together" requirement. *Id.* at 420. The father in the first case, though not living in the mother's home, had a close and continuous relationship with the mother and child, provided financial support, and held himself out as the father. *Id.* The Appellate Division, however, refused to allow him to stop the adoption because he failed to live with the mother for six months prior to the adoption. *Id.* As for the second father, the Appellate Division excused his non-compliance with the "living together" requirement. *Id.* The Appellate Division found the second father took sufficient steps to display his commitment to the child and allowed him to prevent the adoption. *Id. See also In re* Baby Girl Eason, 358 S.E.2d 459, 462 (Ga. 1987) (holding that unwed father had limited time within which to take affirmative action to form relationship with illegitimate child); *In re* Adoption of B.G.S., 556 So. 2d 545, 556 (La. 1990) (overturning child's adoption where unwed father participated in child's upbringing and showed strong desire to accept full parental responsibility).

sponsibilities.[24] The court reasoned that an unwed father who promptly attempted to establish both a legal and emotional bond with the child, regardless of the success of the father's efforts, deserved strong protection of his paternal rights.[25]

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[24] *In re Raquel Marie X*, 559 N.E.2d at 426-27. The Court of Appeals noted that, in order to meet due process and equal protection burdens, the statute needed to further a strong state interest and be closely related to the achievement of a legitimate goal. *Id.* at 425. Although the court found the State's interest in maintaining the integrity of the adoption process to be significant, the court overturned the statute because it severed the father's rights without any consideration of his efforts to establish a relationship with the child. *Id.* at 425-26. The court faulted the statute for its concentration on the father-mother relationship, rather than on the father-child relationship, noting that this errant focus prevented the statute from directly advancing the State's asserted interests. Elise Schlackman, Note, *Unwed Fathers' Rights in New York: How Far Does the Protection Extend?*, 1 CARDOZO WOMEN'S L.J. 199, 200 (1993).

Due to the lack of a factual basis, the *Raquel Marie X* court further dismissed the statute's underlying assumption that a father living with the mother wanted to assume responsibility for the child. *In re Raquel Marie X*, 559 N.E.2d at 426. In addition, the court rejected the State's contention that a two-parent family better promoted the child's best interests. *Id.* at 427.

[25] *Id.* at 424. The court recognized that often, especially with newborns, a complete relationship can not be created prior to the child's placement for adoption, and held that it would protect an unwed father who manifested a desire to fully assume his parental role. *Id. See also* John R. Hamilton, *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949, 1009 (1987/1988) (claiming unwed father had right to know of his child's existence, and, implicitly, right to prevent newborn adoption).

Despite the strong protection afforded in *In re Raquel Marie X*, the court ruled an unwed father lost those rights by not acting promptly to secure them. *In re Raquel Marie X*, 559 N.E.2d at 424-25. *See also* Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313, 351 (1984) (claiming unwed fathers had only limited opportunity to protect their paternal rights before state had authority to revoke those rights); Laurel J. Eveleigh, Note, *Certainly Not Child's Play: A Serious Game of Hide and Seek with the Rights of Unwed Fathers*, 40 SYRACUSE L. REV. 1055, 1080 (1989) (noting unwed father must seek these rights in timely manner to keep state from terminating them). The *In re Raquel Marie X* court further suggested that the unwed father needed to show a willingness to have custody of the child in order to obtain the greatest protection possible. *In re Raquel Marie X*, 559 N.E.2d at 424.

II. *SMITH V. MALOUF*

A. *Opinion of the Court*

In *Smith v. Malouf*,[26] the Mississippi Supreme Court held that when an unwed father attempted to establish a significant relationship with his child, he preserved his parental rights, including the right to prevent the child's adoption.[27] The court rejected arguments that section 93-17-5 of the Mississippi Code governed the rights of such unwed fathers.[28] Rather, the court recognized the statute's constitutionally-suspect nature and determined that a line of United States Supreme Court decisions better explained the current state of the law in this area.[29] The court stressed that the unwed mother maintained her right to terminate the pregnancy, but once she chose to carry the child full-term, she enabled the unwed father to secure these constitutionally-protected rights.[30] Although the court left the lower court with the decision as to the sufficiency of the unwed father's tort claims, the court upheld his ability to seek relief for the alleged infringement of his paternal rights.[31]

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[26] 722 So. 2d 490 (1998).

[27] *Smith*, 722 So. 2d at 497. The Mississippi Supreme Court reasoned that due to the sanctity of the family and the judicial system's long-standing tradition of promoting parental rights, the State lacked the authority to deny an unwed father these rights without a strong reason. *Id.* The court considered a father's failure to accept his parental duties as one instance in which the State could revoke those rights. *Id.*

[28] *Id.* The court, pointing to recent United States Supreme Court cases, ruled the statute did not bar the unwed father's tort claims. *Id.* The court, however, stopped short of judicially overturning the statute, instead leaving the law with the potential to ban similar claims by other unwed fathers where the father involved failed to form a relationship with his child. *Id.* The Mississippi Legislature revised the statute in 1998 to reflect this trend in the case law. *Id.* at 511 n.1. The legislature permitted a father to secure his parental rights by displaying his intentions to support the child within thirty days of its birth. *Id.* at 511.

[29] *Id.* at 494. The *Smith* court viewed these cases as upholding the unwed father's right to act as a parent. *Id.* at 497.

[30] *Id.* at 497-98. The court added that an unwed father had little power to prevent the mother from obtaining an abortion. *Id.* However, that issue became irrelevant upon Malouf's decision to carry the baby full-term. *Id.*

[31] *Id.* at 498. The court found Smith had constitutionally-protected parental

B. Concurring Opinion of Justice Pittman

Presiding Justice Pittman asserted in his special concurrence that, while the unwed biological father lacked parental rights during the pregnancy, he gained the power to secure those rights upon the child's birth.[32] Justice Pittman also concluded that the unwed father's parental rights outweighed the threat that the number of abortions in Mississippi would rise as a result of the court's decision.[33]

C. Dissenting Opinion of Justice Smith

Justice Smith stated in his dissenting opinion that the majority's decision would significantly increase the number of abortions sought by unwed mothers.[34] He added that the dif-

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rights, and the Maloufs potentially violated those rights. *Id.* The father stated three viable causes of action. *Id.* As for the claim for intentional infliction of emotional distress, the court characterized the Maloufs' actions as clearly intentional, resulting in reasonably foreseeable damages. *Id.* The court declared those in the Maloufs' position had reason to know such actions would likely lead to mental and emotional damages in a person who, like Smith, repeatedly sought to establish a relationship with his child. *Id.* The court further held that by acting in concert to perform unlawful acts—violating the injunction and denying Smith his parental rights—the Maloufs enabled Smith to seek recovery for his resulting damages. *Id.* Thus, the court remanded the case to allow a hearing on the merits. *Id.*

[32] *Id.* at 500 (Pittman, J., specially concurring). Justice Pittman, noting the unconstitutionality of Mississippi's statute, reasoned that the Constitution considered a father, even if unwed, more than a mere "stranger" to the child, especially when the father took steps to ensure he did not remain a stranger. *Id.* (Pittman, J., specially concurring). He asserted that the biological link attached the unwed father to the child by a thin thread which he could use to bring himself closer to the child, thus establishing a connection almost unbreakable by the State. *Id.* (Pittman, J., specially concurring). Justice Pittman encouraged the Mississippi Legislature to revise the statute so that unwed fathers had rights that arose upon the child's birth. *Id.* (Pittman, J., specially concurring).

[33] *Id.* at 501 (Pittman, J., specially concurring). Justice Pittman conceded the obvious undesirability of such a result, but concluded that the father's rights deserved so much protection that these fears seemed trivial in comparison. *Id.* (Pittman, J., specially concurring). He also found such decisions to be in the child's best interests. *Id.* (Pittman, J., specially concurring). He concluded that the court should not remove a father's rights because fathers like Smith often could "make uniquely valuable contributions" to the child's life. *Id.* at 500 (Pittman, J., specially concurring).

[34] *Id.* at 502 (Smith, J., concurring in part and dissenting in part). Justice

ferent roles played by mothers and fathers justified a statute that provided the mother with parental rights not guaranteed to the unwed father.[35]

D. Dissenting Opinion of Justice Mills

Justice Mills also dissented, joining Justice Smith in voicing opposition to a decision he felt promoted abortion rather than adoption.[36] He also characterized as unnecessary the majority's expansion of tort law to allow recovery for intentional infliction of emotional distress without proof of other damages.[37]

III. DISCUSSION

In *Smith v. Malouf*, the Mississippi Supreme Court clarified the rights of an unwed father, noting that such a father is entitled to parental rights in certain circumstances.[38] The

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Smith reasoned that abortions would rise because mothers like Malouf would seek to escape the civil liability she might encounter if she carried the child to full term and conducted an adoption without the putative father's consent. *Id.* (Smith, J., concurring in part and dissenting in part).

[35] *Id.* at 504 (Smith, J., concurring in part and dissenting in part). Justice Smith found it ironic that, after this case, a woman would have sole power to abort the fetus but not to decide the child's fate at birth. *Id.* at 502 (Smith, J., concurring in part and dissenting in part). He questioned the decision, claiming the court did not fully take into account how much greater an impact the decision had on the mother. *Id.* at 504 (Smith, J., concurring in part and dissenting in part).

Justice Smith further noted that Malouf had good intentions underlying her actions; her religious beliefs led her to decide against abortion and her concerns for the child led her to allow the child's adoption by a loving, two-parent family. *Id.* at 508 (Smith, J., concurring in part and dissenting in part). Justice Smith stated that, though it was disheartening that the unwed father lost his parental rights, the unwed mother's reproductive rights should supersede any rights of the unwed father to the child. *Id.* (Smith, J., concurring in part and dissenting in part).

[36] *Id.* at 511 (Mills, J., concurring in part and dissenting in part). Justice Mills agreed with Justice Smith's reasoning that the same problems Malouf faced would lead other women in her position to terminate their pregnancies. *Id.* (Mills, J., concurring in part and dissenting in part).

[37] *Id.* (Mills, J., concurring in part and dissenting in part). Justice Mills noted that the unwed father deserved some of the blame for this sequence of events. *Id.* (Mills, J., concurring in part and dissenting in part).

[38] *See supra* notes 7, 16, 25, 32 and accompanying text. The unwed father's

court's decision strengthens the position of an unwed father who has had his parental right to object to the adoption of his child revoked by the State, but it does not hold that an unwed father automatically gains parental privileges by siring a child.[39] Instead, *Smith* places upon an unwed father the burden of promptly making reasonable efforts to act as a father, protecting his rights of fatherhood only when he fully satisfies that burden.[40] The *Smith* decision could have far-reaching consequences because it safeguards these liberties regardless of the father's success in forming a relationship with his child.[41] Furthermore, while *Smith* leaves unaffected the mother's overriding authority to abort the fetus, it impairs her rights by denying her the sole authority to decide the illegitimate child's fate upon birth and by potentially subjecting her to civil liability for preventing the father's exercise of his parental rights.[42]

Although the court found this father's actions adequate to merit protection, its decision left some ambiguities as to the exact basis for determining the sufficiency of other unwed fathers' efforts.[43] Such a decision clearly indicates that the

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rights, however, bowed to the rights of an existing marital family. *See supra* notes 20-21 and accompanying text.

[39] *See supra* notes 7, 15, 25 and accompanying text. By siring the child, the father had inchoate rights that became viable only when the father showed a willingness to act as a father. *See supra* notes 7, 11, 25 and accompanying text.

[40] *See supra* notes 7, 11, 16, 25, 32 and accompanying text. State statutes, to pass constitutional challenges, needed to afford an unwed father a voice in the child's adoption if that father formed a significant father-child relationship. *See supra* notes 7, 16, 25, 32 and accompanying text. The court further protected an unwed father by ensuring him a limited opportunity to accept his parental responsibilities. *See supra* notes 15, 25 and accompanying text.

[41] *See supra* notes 7, 25 and accompanying text. However, when the unwed father's own action or inaction led to his lack of success in forming a relationship, the Supreme Court has refused his claims for parental rights. *See supra* notes 15-16 and accompanying text.

[42] *See supra* notes 6, 11, 30, 31 and accompanying text. Despite these protections, an unwed father lost his parental rights when the mother opted to terminate the pregnancy. *See supra* notes 11, 30 and accompanying text. The fear that a woman might seek an abortion rather than face this potential civil liability led some to oppose the grant of paternal rights to unwed fathers. *See supra* notes 34-36 and accompanying text.

[43] *See supra* notes 7, 25 and accompanying text. Although no court compiled a

outcome of each future suit will be dependent upon the particular facts involved, and that the unwed father must endeavor to provide financial support, form a personal bond, seek custody, and take any other steps necessary to prove his sincerity to the court.[44]

IV. CONCLUSION

The *Smith* decision resolves the conflict between Mississippi's statutory law and United States Supreme Court case law, thus fortifying the parental rights of an unwed father. The ruling preserves an unwed father's parental rights when he establishes, or reasonably attempts to establish, a relationship with his child. Although the decision leaves the lower courts the task of determining, on a case-by-case basis, whether the efforts made to form a custodial, financial, and personal relationship with his child entitle the unwed father to such protection, *Smith* insures an unwed father a much needed chance to act as a parent, and, in doing so, promotes the bonds of family.

Tim Peeples

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list of pertinent factors, unwed fathers who sought custody, attempted to prevent adoptions, included their name on the putative father registry, and otherwise manifested an intent to accept parental duties secured their parental rights. *See supra* notes 7, 15, 25 and accompanying text.

[44] *See supra* notes 7, 11, 15, 23, 25, 27 and accompanying text. An unwed father had to display a sincere desire to act as a parent to obtain protection of his paternal rights. *See supra* notes 7, 11, 25 and accompanying text.

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